TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1924.

No. [redacted]26

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND PENNSYLVANIA-OHIO POWER & LIGHT COMPANY, APPELLANTS,

vs.

THE VILLAGE OF HUBBARD, OHIO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED FEBRUARY 26, 1925.

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OCTOBER TERM, 1923.

No. 228.

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3 UNITED STATES OF AMERICA,
Northern District of Ohio, Eastern Division, ss.

Record of the proceedings of the District Court of the United States within and for the Eastern Division of the Northern District of Ohio, in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said court begun and held at the city of Cleveland, in said district, on the first Tuesday in October, being the 3rd day of said month, in the year of our Lord one thousand nine hundred and twenty-two, and of the independence of the United States of America the one hundred and forty-seventh, to wit: on Monday, the 20th day of November, A. D. 1922.

Present: Honorable Maurice H. Donahue, Circuit Judge, John M. Killits, District Judge, D. C. Westenhaver, District Judge, United States judges.

THE VILLAGE OF HUBBARD, OHIO, vs. UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE Commission, and The Pennsylvania-Ohio Power & Light Company.	No. 680. In equity.

Said action was commenced on the 12th day of December, A. D. 1921, and proceeded to final disposition at the term and day above written, and during the progress thereof, pleadings and papers were filed, process was issued and returned, and orders of the court were made and entered in the order and on the dates hereinafter stated, to wit:

4 [File endorsement omitted.]

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Bill in equity.

(Filed Dec. 12, 1921.)

First. Now comes the plaintiff, the Village of Hubbard, and says that it now is, and at all of the times hereinafter complained of, was a municipal corporation, organized and existing as such and known as a village under the laws of the State of Ohio, and located in Trumbull County, Ohio, and in the Northern District of Ohio, Eastern Division.

That the defendant, The Pennsylvania-Ohio Power & Light Company, is a corporation of the State of Ohio, with offices at No. 25–31 East Boardman Street in the city of Youngstown, Mahoning County, Ohio, which office is located in the Northern District of

Ohio, Eastern Division, and owns and operates an electric street railway, known as Youngstown & Sharon division, which runs between the city of Youngstown, Mahoning County, Ohio, into and thru the village of Hubbard, Trumbull County, Ohio, and thence to the Ohio-Pennsylvania State line in Brookfield Township, Trumbull County, Ohio, which is near the city of Sharon, Pennsylvania, and embraces a distance of about twelve (12) miles.

5 Second. This bill of complaint is brought by the village of Hubbard, Ohio, to restrain the said defendants from further engaging in the collection of rates of fare charged to the citizens and passengers of the village of Hubbard, Ohio, which fares are in excess of those set forth in a certain contract or franchise ordinance, duly passed by the said village of Hubbard, September 12th, 1901, and to set aside, annul, and suspend in whole, an order of the Interstate Commerce Commission, made on November 7th, 1921, increasing the rate of fare, in violation of said contract or franchise ordinance, in Docket No. 12123 of said commission, and thereby invoking the relief provided for in sections 207, 208, 209, 210, and 211 of the Judicial Code of the United States.

Third. That on or about the 12th day of September, in the year 1901, the said plaintiff, the village of Hubbard, as it lawfully might do, entered into a contract, in writing, with the Youngstown & Sharon Street Railway Company, in the form of a street railway franchise ordinance, which was to endure from said date until the first day of January, 1925, a true copy of which said contract or franchise ordinance is hereto attached, marked "Exhibit A" and made a part hereof, as if herein fully rewritten; by the terms and conditions of which the said village of Hubbard granted to said the Youngstown & Sharon Street Railway Company the right to build and construct a line of street railway in and thru said village of Hubbard, along and over certain streets and highways in said village, and over certain private right of way within said village, upon certain terms and conditions particularly set forth in said franchise ordinance, which said contract or franchise ordinance fixed the rates of fare said company might charge, and prescribed conditions upon which the rights, privileges, and franchises therein described were granted to said the Youngstown & Sharon Street Railway Company, its successors, lessees, and assigns.

6 That since the time of entering into said contract or franchise ordinance the rights of the Youngstown & Sharon Street Railway Company arising therefrom were transferred to the Mahoning & Shenango Railway & Light Company, and later to the Pennsylvania-Ohio Electric Company, and at a still later date to the Pennsylvania-Ohio Power & Light Company, defendant herein, which said defendant company assumed the obligations of the Youngstown & Sharon Street Railway Company arising from said contract or franchise ordinance, hereinbefore referred to, and which owns and operates said street railway division, as aforesaid.

Fourth. Plaintiff further says that said contract or franchise ordinance provides for, in sections 10, 11, and 12 of said contract or franchise ordinance, and fixes the rates of fare that said street railway company might lawfully collect for the transportation of passengers upon said line, and that said the Youngstown & Sharon Street Railway Company duly and lawfully accepted the provisions of said contract or franchise ordinance, and together with its successors in interest, operated thereunder, ever since said 12th day of September, 1901, until the 21st day of March, 1920, in strict compliance with the terms and conditions of said contract or franchise ordinance, and especially with regard to the collection from passengers of the fares provided and fixed by said franchise ordinance.

Fifth. Plaintiff further says that said village of Hubbard, ever since the said 12th day of September, 1901, until the present time, has duly performed all conditions, requirements, and obligations by it to be performed, arising from said contract or franchise ordinance.

Sixth. That on or about the 21st day of February, 1920, said the Mahoning & Shenango Railway & Light Company filed its tariff with the Interstate Commerce Commission, to become effective March 21st, 1920, which tariff increased the rates of fare upon said
7 Youngstown & Sharon division, between the village of Hubbard and the city of Sharon, Pennsylvania, and intermediate points, greatly in excess of the rates provided and agreed upon in said franchise ordinance, the exact figures of which are well known to this defendant company.

Seventh. That on or about the 28th day of August, 1920, the said the Pennsylvania-Ohio Electric Company filed its tariff with the Interstate Commerce Commission, to become effective on October 1st, 1920, which tariff further increased the rates of fare upon said Youngstown & Sharon division between the village of Hubbard and the city of Sharon, Pennsylvania, and intermediate points, which tariff is known as I. C. C. No. 4, and provided that the cash fare from Hubbard to Youngstown should be twenty (20) cents, whereas the franchise ordinance aforesaid provided a cash fare of twelve (12) cents, and the cash fare from Hubbard to Sharon was fixed at twenty (20) cents, whereas the franchise ordinance provided for a cash fare of thirteen (13) cents, and other increases were made, too numerous to incorporate in this pleading, but well known to said defendant company and indicated by its said tariff I. C. C. No. 4.

Eighth. Said plaintiff further says that this plaintiff filed its protest to the rates established by the said tariff I. C. C. No. 4, as filed with the Interstate Commerce Commission, on or about the 18th day of September, 1920, and as and for its reasons therefor, set forth that said contract or franchise ordinance was still in force and effect, and that the collection of rates of fare in excess of the provisions of said franchise ordinance would constitute a violation of the constitutional rights of said village, which protest the said Interstate Commerce Commission overruled, and refused to suspend said tariffs.

Ninth. Said plaintiff further says that ever since said 31st day of March, 1920, until the present time said defendant, The Pennsylvania-Ohio Power & Light Company, and its predecessors in interest, have been and now are collecting said rates of fare provided in said tariffs that are in excess of the rates fixed and provided in said contract or franchise ordinance between the village of Hubbard and the city of Sharon, Pennsylvania, and intermediate points.

Tenth. Plaintiff further says that the said defendant, The Pennsylvania-Ohio Power & Light Company, in December, 1920, filed with the Interstate Commerce Commission a petition in a cause known and numbered upon the docket of said commission as Number 12123, wherein said petitioner set forth the ordinance herein referred to, the action of the Ohio Utilities Commission, and praying that a hearing may be had on the matter, and that they might be relieved from the rates prescribed in said franchise for the reason that said rates were discriminatory and unduly preferential, and said Interstate Commerce Commission, on the 21st day of January, 1921, in compliance with said petition, ordered an investigation into said matter and notified this plaintiff and others that an investigation was about to be made into said matters, to which petition and order this plaintiff filed a separate pleading before said Interstate Commerce Commission, demurring to said petition on the ground that the said Interstate Commerce Commission had no jurisdiction to hear or determine the matter set forth in said applicant's petition, and had no authority or jurisdiction to grant relief therein sought, and that the statements contained in said petition did not set forth sufficient facts to invoke the proper jurisdiction of the commission, or to authorize the granting of the relief therein attempting to be sought or any relief whatsoever, and by way of answer set forth that said matters were res adjudicata on account of the holding of the utilities commission of the State of Ohio, made and decided in said matters on the 29th day of September, 1920, and further setting forth the rights of said village by virtue of said franchise ordinance and other defenses, as in said answer more particularly set forth, a copy of which demurrer and answer was thereupon filed with the defendant company herein.

Plaintiff further says that a hearing on said matter was had before said commission on the 5th day of May, 1921, and that on the 7th day of November, 1921, said Interstate Commerce Commission decided said matter adversely to this plaintiff, and sustained the allegations of the petition of said The Pennsylvania-Ohio Power & Light Company therein filed, and entered thereunder the following order:

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 7th day of November, A. D. 1921.

No. 12123.

Ohio rates, fares, and charges.

In the matter of rates, fares, and charges of the Pennsylvania-Ohio Power & Light Company within the States of Ohio and Pennsylvania.

This case being a proceeding instituted by the commission upon petition filed, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered that the Pennsylvania-Ohio Power & Light Company be, and it is hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist in the relation of interstate and intrastate passenger fares, and to establish, put in force, and maintained passenger fares for the transportation of passengers in intrastate commerce between Hubbard, Ohio, and Youngstown, Ohio, which shall not be less than 20 cents when paid in cash, and $5 for 54 rides, when a commutation ticket for this transportation is purchased.

It is further ordered that this order shall take effect on or before January 4, 1922, upon notice to this commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and remain in force until the further order of the commission.

By the commission.

GEORGE B. MCGINTY,
Secretary.

Eleventh. Plaintiff respectfully shows to the court that the
10 said order of the Interstate Commerce Commission of November 7th, 1921, is void for the following reasons:

(*a*) Because said Interstate Commerce Commission, in said order, attempted to fix the fare of intrastate business, which order is contrary to the authority granted said commission by Congress, and therefore has no jurisdiction of the subject matter herein contained.

(*b*) Because the said order, increasing said rate of fare, will deprive this plaintiff of its property without due process of law, take

its property without compensation, and deny to it equal protection of the law, as guaranteed to it by the provisions of the constitution of the State of Ohio, article 1, section 19, and of the Constitution of the United States of America, 5th amendment.

(*c*) Because the enforcement of said order will impair the obligations of a valid and subsisting contract existing between this plaintiff and The Pennsylvania-Ohio Power & Light Company, without the consent of the said plaintiff herein.

(Amendment by leave of court, Dec. 29/21:)

(*d*) Because The Pennsylvania-Ohio Power & Light is not a common carrier and is not an interurban electric railway operated as a part of a general steam railway system of transportation, nor is it engaged in the general transportation of freight; that said defendant, the Interstate Commerce Commission, was without jurisdiction under the Constitution and laws of the United States to hear or determine the said controversy or to make any order therein.

Twelfth. Plaintiff further says that by reason and virtue of all of the facts and acts of said Interstate Commerce Commission this plaintiff has been injured in its property rights and has no adequate remedy at law in the premises hereinbefore set forth and will suffer irreparable injury unless accorded the injunctive relief as herein prayed for.

Wherefore, inasmuch as plaintiff has no remedy in the premises by the strict rules of the common law, and can only obtain relief in a court of equity, where matters of this nature are properly cognizable and relievable, plaintiff therefore prays that the aforesaid order of said Interstate Commerce Commission, made in said cause No. 12123, on November 7th, 1921, be wholly set aside and annulled, and that the defendant, The Pennsylvania-Ohio Power & Light Company, be temporarily enjoined from collecting or attempting to collect any fares in excess of the rates provided in said franchise contract and from filing with the said defendant, the Interstate Commerce Commission, any tariff schedules embodying rates in advance of those prescribed by said franchise ordinance, and that the Interstate Commerce Commission be enjoined from accepting or filing any such schedules from said defendant, The Pennsylvania-Ohio Power & Light Company, that may be in excess of the rates prescribed by said franchise ordinance, and that upon final hearing said temporary injunction may be made permanent, and that complainant be granted such other and further relief as it may be entitled to in the premises.

JOHN J. BOYLE and
MOORE, BARNUM & HAMMOND,
Attorneys for Plaintiff.

[Affidavit of Charles F. White to above paper omitted in printing.]

12 *Exhibit A to bill.*

AN ORDINANCE

Granting the Youngstown & Sharon Street Railway Company the right to depart with its line of track from North Main Street, in the village of Hubbard, and to construct the same on private right of way over the track of the Erie Railroad Company and the Lake Shore & Michigan Southern Railway Company and releasing said company from any obligation to construct its tracks on a portion of North Main Street and established the curve of its track at the corner of Main and Liberty Streets, and fixing the rate of fare said company may charge and prescribing conditions upon which the rights, privileges, and franchises herein described are granted.

Whereas the council of the village of Hubbard did, by an ordinance entitled "An ordinance granting the Youngstown & Sharon Street Railway Company the right to construct and operate a street railway in the village of Hubbard," passed the 19th day of March, 1900, grant to said The Youngstown & Sharon Street Railway Company the right to construct and operate a street railway on certain streets in said ordinance mentioned, among others North Main Street in said village; and

Whereas said street railway company has proceeded under said ordinance with the construction of its said line of railway along and upon Liberty Street in said village and along and upon a portion of Main Street in said village; and

Whereas differences have arisen between the village of Hubbard and the said The Youngstown & Sharon Street Railway Company with reference to the kind of curve to be used by said street railway company at the corner of Main and Liberty Streets in said village and the location thereof, and a suit is pending between said company and the said village with reference thereto; and

Whereas the said The Youngstown & Sharon Street Railway Company desires to avoid crossing the tracks of the Erie Railroad Company and the Lake Shore and Michigan Southern Railway Company on North Main Street, and the said street railway company is in control of a certain tract of land abutting on the easterly side of North Main Street in said village at a point about opposite the north line of lot No. 3, in great lot No. 46, in said village, and has acquired a private right of way from that point over the tracks of said railroad company's to a point some distance northerly therefrom, and desires to construct its line of street railway between the said points on said private right of way to the northerly line of the village limits; and

Whereas other differences have arisen between the village authorities and said street railway company with reference to the manner of constructing said street railway in said streets of said village and the restoration of said streets, and its is desired by both parties to adjust all said differences, and said village of Hubbard is

willing to grant the rights, privileges, and franchises herein granted upon consideration of the obligations herein assumed by said The Youngstown & Sharon Street Railway Company, and especially from the rates of fare which it herein agrees to carry passengers over its lines of railway:

Now, therefore, be it ordained by the council of the village
13 of Hubbard, Ohio—

SEC. 1. That the rights, privileges, and franchises herein granted to said The Youngstown & Sharon Street Railway Company are granted upon the conditions that said railway company, its successors, lessees, and assigns shall well and truly observe and perform all the terms and conditions hereof and especially observe and conform to the rates of fare for carrying passengers and the sale of tickets herein prescribed.

SEC. 2. That the said street railway company shall have the right to construct and maintain at the corner of Main and Liberty Streets, in said village, a spiral curve to fit a 45-foot radius, the center of the track to be not more than 19–2 feet from the stone monument at the intersection of the center line of West Liberty Street measuring in the direction of the intersection of the north line of West Liberty Street with the west line of North Main Street, according to the plan and profile on file with the village council. Said curve at said corner shall be paved by said company with brick between the rails and for five feet on the outside of the outer rail and in as far from the inner rail as the corner of the curb and said paving shall be done in such manner as to make said streets at said point suitable, safe, and convenient for public travel. And said railway company shall maintain said paving at said point in manner as aforesaid in a safe and suitable condition for public travel. And shall construct a suitable culvert or drain as will permit the free and unobstructed flow of water around the corner.

SEC. 3. That The Youngstown & Sharon Street Railway Co. be, and the same hereby is, granted the right and privilege to extend its line of street railroad on North Main Street from a point about opposite the north line of lot No. 3 in great lot No. 46 in said village, with a curve having a 60-foot radius, easterly from the center of said street to and upon the private right of way of said company at that point and to connect said track with its track constructed upon said private right of way; that said railway company in constructing said curve may use the curve, rails, and appliances bought by said company for use at the corner of Main and Liberty Streets in said village. Said company shall pave said Main Street the whole length of said curve to the curb line of the street between the rails and for a distance of five feet on each side thereof with brick, so as to render said street safe and convenient for public travel thereover, and shall thereafter so maintain the same, and said curve and said portion of said track connecting the said company track on Main Street with its track upon said private right of way as aforesaid shall be so laid by said company and with such suitable culvert or

drain as will permit the free and unobstructed flow of water down along the east side of said Main Street at said curve.

SEC. 4. That The Youngstown & Sharon Street Railway Company is hereby released and excused from construction and operating that part of its line on North Main Street from the point on North Main Street where it is permitted by section three of this ordinance to turn to and upon its private right of way to the north boundary of said village and is hereby granted the right to operate its said line of railway on and over the private right of way aforesaid in the place of constructing and operating it along and over said portion of said Main Street.

14 SEC. 5. That said single track as well as said double track when laid shall be so laid upon said street as that the top of the rail shall be on a level with the present established grade of said streets, and the rails of said track shall not be laid or maintained, if laid, above the established grade of said streets, except with the consent of the village council of village of Hubbard and consent in writing of the owners of the lots or lands abutting upon the parts of said streets wherein it is desired to lay or maintain rails above the present established grade of said streets and raise the sidewalks on said street or streets at such points to correspond with such elevation of said streets. What the present established grade is shall be determined by council from a profile of said grade in its possession in case there is any uncertainty concerning the same: Provided, however, That where said tracks are now laid above said grade the said company shall have the right to lower the same to conform to said grade: Provided, however, The said street car company shall not use its tracks for the purpose of hauling passengers until said tracks shall be lowered to conform to said grade unless it has obtained said consent in writing of aforesaid from said property owners.

SEC. 6. That said railway company shall within sixty days after said street railroad shall be put in operation in said village place the streets in said village where said tracks are laid in a safe, proper, and convenient condition for public travel, to the full satisfaction of the council, to such width as the council may determine but not beyond the present curb lines; and in so restoring streets to public travel as aforesaid where the tracks and rails of said railroad company are laid above the established grade of said street, if so laid pursuant to the preceeding section, it shall bring said street or streets to a grade corresponding to the level of the top of said rails as the council shall direct with furnace cinder and shall place said street or streets throughout their entire extent where tracks are laid in such condition as will enable persons using them with vehicles to do so and to cross the railway tracks at any point with safety and convenience; and said Railway Co., where its tracks in said streets or either of them are laid above the established grade of the street, shall bring the sidewalks in such portion of said streets to such grade corresponding with the grade of the street after its restoration as

aforesaid, as council shall direct, and in bringing said sidewalks to such grade it shall relay them as the council shall direct, and said street railway company shall pay all the expenses for placing said streets and sidewalks in the manner aforesaid and the grade and condition aforesaid. That in case said street railway company fails to place said streets and sidewalks in the condition aforesaid and bring them to the grade aforesaid within said period of sixty days, then the council may do the same and the said company shall pay the cost thereof to said village, and said village shall have the right to collect such cost from said company by civil action.

SEC. 7. That iron or wooden poles may be used in the construction of said street railway. The poles and wires thereof shall be so located and maintained as to prevent any interference or damage to the electric-light wires and to existing telephone and telegraph lines and the fire alarm or police patrol wires of said village, and the village council shall have the right to determine and establish the height, size, and sightliness and location of said poles; that said poles shall be set perpendicular and kept painted. That all the poles now set on said Liberty and Main Streets shall within thirty days after the passage of this ordinance and its acceptance by said street railway company as herein provided be reset so as to stand perpendicular, and in default of said company so doing said village may take up and remove said poles, and said street railway company shall remove and reset the electric-light pole at the corner of North Main and West Liberty Streets to such place as council may direct.

SEC. 8. That said company after the completion of said street railroad shall run cars over its line of railway as often and according to a schedule hereafter to be fixed by the council.

SEC. 9. That the suits now pending in the court of common pleas of Trumbull County, Ohio, wherein the village of Hubbard and the said street railway company are parties, shall, upon the passage and due publication of this ordinance and its acceptance by said railway company, be each and all dismissed and said railway company shall pay all the costs made on each of said suits. And the said street railway company shall pay to the attorneys of the village of Hubbard for their legal services in the matters relating to the settlement and adjustment of the differences between said company and said village and their services in said suits of sum of $700, which shall be in full thereof.

SEC. 10. That said The Youngstown & Sharon Street Railway Company shall carry passengers as herein provided and for the following rates of fare and shall sell tickets as herein provided:

(*a*) From any point in the village of Hubbard to any point not exceeding one and one-half (1½) miles beyond the corporation limits of said village on its lines either towards Youngstown or towards Sharon or to any intermediate point and from any such point to any such point in said village of Hubbard for a single cash fare of (5) five cents.

(*b*) From any point in the village of Hubbard to any point on its line in the city of Youngstown and from any point in said city to any point on its line in said village for a single cash fare of (12) twelve cents.

(*c*) From any point in the village of Hubbard to any point on its line in the borough of Sharon and from any point on its lines in said borough to any point on its line in said village for a single cash fare of (13) thirteen cents.

(*d*) Said street railway company shall, upon a demand of any person entering any of its cars within the limits of the village of Hubbard of the conductor or other person in charge of such car, sell such a person a ticket to Youngstown and return for (20) twenty cents, which shall entitle the purchaser thereof to ride upon any of said company's passenger cars operated over said line from a point in the village of Hubbard to any point on its line in the city of Youngstown, and the return portion of said ticket shall entitle holder thereof to ride upon any of the company's cars operated over said line from any point on its line in the city of Youngstown to any point on its line in the village of Hubbard. The return portion of said ticket shall be received by said company for fare between said city as aforesaid and said village as aforesaid in either direction whenever presented therefor. And said street railway company shall upon like demand by any person entering any of its cars within the limits of the village of Sharon and return for a like sum which shall in like manner entitle the purchaser to ride upon any of the company's cars from any point on its line in village of Hubbard to any point on its line in the borough of Sharon, and the return portion of said ticket shall entitle the holder thereof to ride on any of the company's cars operated over said line from any point on its lines in said borough of Sharon to any point on
16 its line in the village of Hubbard or from any point in village of Hubbard to any point in the borough of Sharon. And the return portion of said ticket shall be received by said company for fare as aforesaid whenever presented therefor.

(*e*) Said street railway company shall upon demand therefor by any person entering any of its cars within the limits of the village of Hubbard, of the conductor or any other person in charge of such car, sell such person eleven round-trip tickers for $2.00, any one of which shall entitle the holder thereof to ride on any of the cars of said company from any point on its line in the village of Hubbard to any point on its line in the city of Youngstown or to any point in the borough of Sharon on its line, and the return portion of such tickets shall entitle the holder thereof to ride from any point on its line in the city of Youngstown or the borough of Sharon to any point on its line in the village of Hubbard in either direction whenever presented therefore. And said railway company shall keep conductors or other persons in charge of its cars constantly supplied with tickets of the several kinds hereinbefore prescribed so as to supply persons and

passengers therewith upon their demand as provided therein. Said company shall keep said tickets on sale at some convenient place in the village of Hubbard where persons living in or residents or citizens of said village may at all reasonable times, upon request and tender of payment of the sum herein prescribed, conveniently obtain and purchase the same. Each of said round-trip tickets shall be so made and printed that the return part thereof can be easily detached from the other part thereof.

(*f*) Said street railway company shall sell to any person on demand commutation tickets as follows: One commutation ticket, good for thirty days after the date of purchase for fifty-four single trips over its said line of railway from any point in the village of Hubbard to any point in the city of Youngstown and from any point in the city of Youngstown to any point in the village of Hubbard. And said company shall sell in like manner a like ticket good for a like time and a like number of trips from any point in the village of Hubbard to any point in the borough of Sharon and from any point in the borough of Sharon to any point in the village of Hubbard. Such commutation tickets shall be sold for $3.80 each.

SEC. 11. Children five years of age and under when accompanied by some person having them in charge shall be carried free over any portion of said company's lines throughout its entire extent.

(*a*) Said street railway company shall sell to any student who is attending any public schools in the city of Youngstown on demand a school commutation ticket good for thirty days after the date of purchase for 46 single trips over its said line of railroad from any point in the village of Hubbard to any point in the city of Youngstown and from any point in the city of Youngstown to any point in the village of Hubbard. Such commutation tickets shall be sold for $2.40 each.

(*b*) In case the Youngstown & Sharon Street Railway Company, its successors, lessees, and assigns, shall hereafter reduce its rates of fare between points mentioned in sec. 10 and its subdivisions thereof, then the rates of fare charged to persons taking passage upon its cars in Hubbard for other points mentioned in said sec. 10 and its subdivisions thereof shall be reduced proportionately to same rates.

SEC. 12. That in case said street railway company or any of its conductors or any other person in charge of any of its cars operated over its line of railroad fail or refuse to sell to any of the persons herein prescribed upon request any of the various classes of
17 tickets herein provided for, or in case said company fails or refuses to keep such tickets on sale at a convenient place in the village of Hubbard as prescribed herein, then and in that event it shall be unlawful for said company to charge such persons whether going from the village of Hubbard to or towards Youngstown or to or towards the borough of Sharon or any point therein to Hubbard a rate of fare not to exceed one cent per mile for the distance traveled by such person or to receive any fare from him in excess of one cent

per mile as aforesaid; provided, however, that said company shall not be required to accept or receive for a single fare less than 5 cents.

SEC. 13. That said street railway company shall cause each and all of its cars to stop within the limits of the village of Hubbard at convenient places, not less than three in number, to be designated by the village council, to take in and let off passengers; provided, however, that if said company operate a through special car or cars from Youngstown to Sharon at a high rate of speed, such cars shall not be required to make more than two stops within the limits of said village, which stopping places shall be designated by the council of said village.

SEC. 14. Any conductor or other person in charge of any cars operated by said street railway company over said line of road from Youngstown to Sharon or intermediate points who fails or refuses for any reason to sell any of the classes of tickets herein provided for on demand and offer to pay therefore the sum herein fixed shall upon arrest and conviction thereof be fined not less than $5.00 and not more than $15.00 and pay the costs of prosecution and stand committed until fine and costs are paid.

SEC. 15. That the terms and conditions of this ordinance, and especially the rates of fare herein fixed, shall be obligatory on the said Youngstown & Sharon Street Railway Company, its successors, lessees, and assigns.

SEC. 16. That the rights and privileges granted by this ordinance and the liabilities imposed herein shall continue in force up to and until the first day of January, A. D. 1925.

SEC. 17. That said railway company shall pay the cost of advertising this ordinance.

SEC. 18. That this ordinance, nor any part nor any section thereof, shall take effect and be enforced until after its passage and legal publication nor until said The Youngstown & Sharon Street Railway Company shall have accepted the same in writing, deposited with the clerk of the village of Hubbard the said sum of seven hundred dollars, and deposited with the clerk of said village the sum of one hundred dollars to secure the payments of the purchase price for a portion of the electric-light plant lot in case of sale of same.

Passed in council this 12th day of September, 1901.

Sept. 19.

W. H. DAVIS, *Mayor.*
T. S. CLINGAN, *Clerk.*

I hereby certify the above ordinance was published in the Hubbard Enterprise September 19, 1901.

T. S. CLINGAN, *Clerk.*

18 *Exhibit to bill.*

7256

INTERSTATE COMMERCE COMMISSION.

No. 12123.

Ohio rates, fares, and charges.

In the matter of rates, fares, and charges of the Pennsylvania-Ohio Power & Light Company within the States of Ohio and Pennsylvania.

Submitted May 5, 1921. Decided November 7, 1921.

Certain intrastate passenger fares maintained by petitioner in Ohio found to be unduly preferential of intrastate passengers, unduly prejudicial to interstate passengers, and unjustly discriminatory against interstate commerce. Fares prescribed which will remove such preference, prejudice, and discrimination.

Douglass D. Storey and Hause, Evans & Baker for petitioner.
John J. Boyle for village of Hubbard, Ohio.
J. H. Leighninger for city of Youngstown, Ohio.

Report of the commission.

By the commission:

This proceeding was instituted by us upon petition filed on behalf of the Pennsylvania-Ohio Power & Light Company, hereinafter referred to as the petitioner, which operates an electric line approximately 14.5 miles in length between the cities of Youngstown, Ohio, and Sharon, Pa., passing through the village of Hubbard, Ohio. The maximum distances from Youngstown and Sharon to Hubbard are 8.75 miles and 7.18 miles, respectively. The petition alleges that by reason of a franchise contract with the village of Hubbard, made in 1901 by its predecessor, the petitioner is unable to increase its passenger fares between Hubbard and Youngstown to the basis of its fares between Hubbard and Sharon, resulting in undue and unreasonable preference and advantage to persons traveling between Youngstown and Hubbard, and in undue prejudice and disadvantage to other persons traveling interstate between Sharon and Hubbard and to the city of Sharon, and also in unjust and unreasonable discrimination against interstate commerce. It is further alleged that petitioner's inability to increase its intrastate fares to a reasonable basis deprives it of sufficient revenue to pay its operating expenses and the cost of maintaining its property devoted to said service.

19 In 1917 the Youngstown-Sharon Street Railway Company, the original corporation owning the Youngstown-Sharon line,

was merged with four other Ohio corporations and one Pennsylvania corporation under the name of the Mahoning & Shenango Railway & Light Company. This name was subsequently, in 1920, changed to the Pennsylvania-Ohio Electric Company. Later it became necessary to eliminate smaller portions of the railway operations, and on November 1, 1920, a new corporation, the Pennsylvania-Ohio Power & Light Company, the petitioner herein, was formed to take over the Youngstown-Sharon line. The entire common stock of the petitioner is owned by the Pennsylvania-Ohio Electric Company, but its bonds and notes are held by the public, as is also its preferred stock. The line acquired by the petitioner extends only to the Ohio-Pennsylvania State line, and the company operates into Sharon over the tracks of the Shenango Valley Traction Company. The petitioner acquired no power plant, but purchases power from the Ohio-Pennsylvania Electric Company on the basis of actual cost to generate.

Petitioner maintains a regular interurban passenger service every half hour between Youngstown and Sharon. It also maintains additional separate services between Hubbard and Youngstown and Hubbard and Sharon. Petitioner is also engaged in the transportation of freight, as will be later explained. Passenger fares only are involved.

A franchise ordinance passed by the village of Hubbard in 1901, and accepted by the Youngstown & Sharon Railway, one of the predecessors of petitioner, provided for the maintenance between Hubbard and Sharon of a cash fare of 13 cents, and between Hubbard and Youngstown of a cash fare of 12 cents. Between Hubbard and both cities the franchise required the maintenance of round-trip tickets at the rate of 20 cents, special tickets good for 22 rides for $2, and 54-trip commutation tickets for $3.80. These fares are still in effect on intrastate travel between Hubbard and Youngstown, and yield, in the order named, 1.37, 1.14, 1.04, and 0.81 cents per mile. Effective February 15, 1920, the Mahoning & Shenango Railway & Light Company, then operating the petitioner's line, by its tariff duly filed with this commission, increased its one-way fare between Hubbard and Sharon to 20 cents, the price of a 54-trip commutation ticket to $5, and canceled the round-trip and special tickets between those points. Subsequently the Pennsylvania-Ohio Electric Company, successor to the Mahoning & Shenango Railway & Light Company, filed with this commission its tariff I. C. C. No. 4, in which it proposed to establish the same fares between Hubbard and Youngstown as those in effect between Hubbard and Sharon, above
20 enumerated, and also to establish between Youngstown and Hubbard an 8-trip ticket for $1. It was also proposed to increase the one-way fare between Sharon and Youngstown from 30 to 35 cents, yielding 2.41 cents per mile, and the 54-trip commutation ticket between those points from $9 to $10, or to a basis of 1.27 cents per mile. This tariff became effective on interstate travel

October 1, 1920, and was adopted by the petitioner, the successor to Pennsylvania-Ohio Electric Company, on November 25, 1920. A tariff carrying the same fares was rejected by the Public Utilities Commission of Ohio in so far at it attempted an increase in the fares between Hubbard and Youngstown on the ground that it was without jurisdiction to allow the establishment of rates and charges in excess of those prescribed by the franchise contract. Refusals of the Public Utilities Commission of Ohio to allow increases in fares in similar cases have been sustained by the Supreme Court of Ohio. The petitioner shows that prior to filing this petition it and its predecessors exhausted all means through negotiation with the village of Hubbard and otherwise to obtain relief from the franchise fares between Hubbard and Youngstown, but without avail.

The fare applicable to local traffic within the corporate limits of the village of Hubbard is 5 cents and within the corporate limits of Youngstown 9 cents. Petitioner does not seek an increase in these fares. However, under the Hubbard franchise petitioner is also required to maintain the 5-cent fare between any point within the village and any point not exceeding 1.5 miles beyond the limits of the village in either direction. It developed at the hearing that petitioner seeks to limit the 5-cent fare to points within the village of Hubbard. It was also developed at the hearing that under an ordinance of the county commissioners of Mahoning County, Ohio, petitioner is also required to maintain a 5-cent fare between Youngstown and the Mahoning-Trumbull County line, which is 5.40 miles from petitioner's terminal in Youngstown. It desires to increase this fare to 10 cents. The petition on which the order of investigation herein is based, the evidence taken, and briefs filed all relate largely to the intrastate fares between Hubbard and Youngstown as compared with the interstate fares between Hubbard and Sharon. As the petition disclosed no complaint against the fare between Youngstown and the county line referred to the authorities of Mahoning County were not served with a copy of our order of investigation herein.

The fares proposed by petitioner between Hubbard and Youngstown—20 cents one way, 8 tickets for $1, and 54-trip commutation ticket for $5—yield revenue, per passenger-mile, in the order named, of 2.29 cents, 1.43 cents, and 1.06 cents.

21 Evidence was submitted showing that industries, mercantile establishments, and amusement houses in Sharon compete with those in Youngstown; that residents of Hubbard are employed at each place who travel daily back and forth over petitioner's line; also that many of Hubbard's residents likewise travel to one or the other of these points to purchase goods or for other purposes; and that in this transportation Sharon and its patrons are discriminated against by reason of the lower intrastate fares between Hubbard and Youngstown. The mayor of Sharon testified that there are workmen living in Hubbard who are employed at Sharon.

There are many ways in which a passenger may defeat the through fare between Sharon and Youngstown. By paying the combination fare to and from Hubbard the through fare is defeated by 3 cents; by paying the 20-cent fare to Hubbard and using a portion of a round-trip ticket between Hubbard and Youngstown which is good in either direction, the through fare is defeated by either 5 or 6 cents according to the price paid for round-trip ticket. Other combinations lower than the through fare can be made by using commutation tickets between Hubbard and Youngstown. While the petitioner's tariff contains a provision against fare splitting the impossibility of enforcing it is asserted.

The following table taken from exhibits of record gives a summary of passenger revenue and operating expenses for the year 1920, and, based on the traffic during January, 1921, estimates of what the result of operation will be for the entire year 1921, under the present fares, and what it would be under the proposed fares. The figures submitted do not include any reserve for depreciation, renewals, or for interest on funded and unfunded debt. With the exception of a few items directly related to freight traffic, which were omitted, all of the operating expenses were charged to passenger traffic.

	Actual for 1920.	Estimate for 1921 (present fares).	Estimate for 1921 (proposed fares).
Revenue	$332,173.43	$367,529.22	$417,127.00
Operating expenses:			
Way and structures	48,164.07	65,500.00	65,500.00
Equipment	67,544.52	63,600.00	63,600.00
Power	46,327.22	37,600.00	37,600.00
Transportation	107,005.25	129,400.00	129,400.00
Traffic	595.55	1,200.00	1,200.00
General and miscellaneous	52,129.58	54,000.00	54,000.00
Taxes	23,309.36	23,779.07	24,491.94
Total expenses and taxes	345,075.55	375,079.07	375,791.94
Balance	[1] 12,902.12	[1] 7,549.85	41,335.06

[1] Deficit.

22 It will be noted that the estimated cost of power in 1921 is substantially lower than the 1920 cost. This is due to the fact that the power is purchased at the switchboard cost and a reduction in the cost of coal is estimated. Power cost in 1920 was 1.42 cents per kilowatt hour and the 1921 estimate is 1 cent.

It is shown that in 1920 the operations between Hubbard and Youngstown were conducted at a loss of $31,264.06, as compared with a profit of $18,361.94 between Hubbard and Sharon. The petitioner estimates that in 1921 it will transport 1,897,890 intrastate and 1,180,607 interstate passengers, and that at the present fares the

intrastate passenger traffic will yield $162,721 as against $204,808 from the interstate passenger traffic. In other words, intrastate traffic, constituting 61.7 per cent of the total traffic, will yield but 44.5 per cent of the total revenue, resulting in a deficit for the entire operation of $7,549.85, as shown above. It estimates that under the proposed fares the Youngstown-Hubbard deficit would be turned into a profit of $16,399.25.

The petitioner has connections, one direct and the other over a private siding, at Masury and at Stop 41, both east of Hubbard, with the New York Central Railroad, and while petitioner does not originate and deliver freight traffic to this line, it received from it, during the year 1919 and 1920, 922 cars of freight for delivery chiefly at points on the petitioner's line. The New York Central forms a connecting link between petitioner's line and other trunk lines. The petitioner also operates a daily less-than-carload freight service between Youngstown and Sharon, and on three days a week operates a through car between Sharon and New Castle, Pa., via Hubbard and the Sharon & New Castle Railroad. The petitioner also participates with other electric lines in through freight rates from points on its line to Cleveland and Toledo, Ohio, Detroit, Mich., and other points. In 1919, the less-than-carload freight amounted to 6,240 tons and produced a revenue of $18,000, and the carload and switching revenue was $6,246.52. The total, $24,246.52, amounted to about 7 per cent of the gross earnings. In 1920 the less-than-carload tonnage was 5,474 and produced a revenue of $21,221, and the carload and switching traffic yielded $5,259. The total, $26,480, was 7.4 per cent of the gross earnings of the petitioner for that year.

The petitioner submitted a valuation of its physical properties, but for the purposes of this investigation it is unnecessary to discuss it. Without consideration of returns on any value whatever, deficits are encountered.

23 The position of the village of Hubbard is summed up in a statement contained in its brief as follows:

To the claim made by the petitioner that the rates of fare fixed and prescribed by the terms of said franchise ordinance do not provide sufficient compensation or income to maintain proper service and afford a sufficient return on the capital invested, our answer is that this is not the concern of the village of Hubbard, for a bargain is a bargain, and a contract duly entered into by persons competent to enter into it is binding upon all parties and can not be modified or changed without the consent of all parties. The street railway company had an equal opportunity with the village of Hubbard of looking into the future and foreseeing conditions that might arise, and accepted the contract with its burdens as well as its privileges. The evidence shows that ever since the acceptance of the ordinance in 1901 this company has collected these rates of fare provided by the ordinance, while other companies in other localities were carrying

passengers for a less rate of fare over a similar distance, and in justice to all they must consider the fat years with the lean ones, and in so considering a much greater period of time elapsed between 1901 and 1917, when expenses increased and earnings fell off more than from the latter date to the present time, of which the petitioner complains.

The answer to this is that if the maintenance of fares fixed by a franchise contract results in unjust discrimination against interstate commerce, it is within our power to remove it by prescribing other and different intrastate fares.

It is not shown that the present interstate fares between Hubbard and Sharon or between Sharon and Youngstown are unreasonable. On the other hand they appear to be relatively lower than fares maintained by other electric interurban railways in Ohio in the same general territory. For illustration, the fares of the Youngstown & Suburban Railway, extending from Youngstown to Leetonia, 19 miles, and of the Northern Ohio Traction & Light Company, extending from Cleveland to Urichsville, 103 miles, are on a basis of approximately 3 cents per mile.

We are of opinion and find that the interstate passenger cash and 54-ride commutation fares of the Pennsylvania-Ohio Power & Light Company between Sharon and Hubbard, also the interstate passenger fares between Sharon and Youngstown, are just and reasonable fares for interstate transportation between those points; and that the maintenance of corresponding intrastate fares between Hubbard and Youngstown lower than the just and reasonable interstate fares between Sharon and Hubbard has resulted and will result in undue prejudice to persons traveling in interstate commerce over the petitioner's line in the state of Ohio and between points in the state of Ohio and Sharon, Pa.; in undue preference and advantage to persons traveling intrastate between points in Ohio; and in unjust discrimination against interstate commerce.

24 We further find that, whether the aforesaid passenger fares pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services are performed by the petitioner under substantially similar circumstances and conditions; and that said undue prejudice and preference and unjust discrimination can and should be removed by establishing intrastate passenger cash and 54-ride commutation fares between Hubbard and Youngstown not less than the interstate passenger fares herein found reasonable between Hubbard and Sharon.

An appropriate order will be entered.

Commissioners Aitchison, Potter, and Campbell dissent.

25 ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 7th day of November, A. D. 1921.

No. 12123.

Ohio Rates, Fares, and Charges.

In the Matter of Rates, Fares, and Charges of the Pennsylvania-Ohio Power & Light Company within the States of Ohio and Pennsylvania.

This case being a proceeding instituted by the commission upon petition filed, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, that the Pennsylvania-Ohio Power & Light Company be, and it is hereby, notified and required, to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist in the relation of interstate and intrastate passenger fares, and to establish, put in force, and maintain passenger fares for the transportation of passengers in intrastate commerce between Hubbard, Ohio, and Youngstown, Ohio, which shall not be less than 20 cents when paid in cash, and $5 for 54 rides when a commutation ticket for this transportation is purchased.

It is further ordered, that this order shall take effect on or before January 4, 1922, upon notice to this commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and remain in force until the further order of the commission.

By the commission.

[SEAL.] GEORGE B. MCGINTY,
Secretary.

26 [File endorsement omitted.]

In the District Court of the United States, Northern District of Ohio, Eastern Division.

[Title omitted.]

Motion to dismiss.

(Filed Dec. 29, 1921.)

United States of America, by its counsel, now comes and moves the court to dismiss the bill of equity filed against it in the above-entitled cause.

As grounds for this motion it is shown—

1. The plaintiff is without interest in the controversy and has no standing in this court to maintain the bill.

2. The bill is without equity on its face and does not state any cause of action against the United States.

Wherefore, defendant prays that its motion be sustained.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
E. S. WERTZ,
United States Attorney.

27 [File endorsement omitted.]

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Motion to dismiss plaintiff's bill.

(Filed Dec. 23, 1921.)

To the Honorable the Judges of said Court:

And now, this ——— day of December, 1921, the Pennsylvania-Ohio Power & Light Company, one of the above-named defendants, by its attorneys, moves your Honorable Court to dismiss the bill for the following reasons:

1. The bill on its face discloses not ground for equitable relief.

2. By the act to regulate commerce (act of 4 February, 1887, 24 Stat. L. 379), as amended, and particularly as amended by the transportation act of 1920 (act of 28 February, 1920, 41 Stat. L. 456), the Congress has conferred upon the Interstate Commerce Commission authority to make and enter the order herein attacked.

3. The said order of the Interstate Commerce Commission does not violate any provision of the Fifth Amendment to the Constitution of the United States.

4. The said order of the Interstate Commerce Commission was made and entered pursuant to its statutory powers granted by the Congress by the aforesaid acts, and under Article VI,
28 section 2 of the Constitution of the United States, the aforesaid acts of Congress, and the said order of the Interstate Commerce Commission are the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or the laws of the State of Ohio to the contrary notwithstanding.

5. The said order of the Interstate Commerce Commission impairs no obligation of any contract between the plaintiff and this defendant, The Pennsylvania-Ohio Power & Light Company; but even if it did, there is no constitutional prohibition restraining the Congress from impairing the obligation of any contract.

Wherefore, the Pennsylvania-Ohio Power & Light Company moves your Honorable Court to dismiss the bill at the cost of the plaintiff, and it will ever pray, etc.

HARRINGTON, DE FORD, HEIM & HUXLEY,
HAUSE, EVANS, AND BAKER,
Attorneys for the Pennsylvania-Ohio Power & Light Company.

Receipt of a copy of the within motion is hereby acknowledged this 23rd day of December, A. D. 1921.

VILLAGE OF HUBBARD,
By JOHN J. BOYLE,
Its Attorney.

29 [File endorsement omitted.]

In the District Court of the United States, Northern District of Ohio, Eastern Division.

[Title omitted.]

Answer of the Interstate Commerce Commission.

(Filed Dec. 29, 1921.)

The Interstate Commerce Commission, one of the defendants in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiff's bill of complaint, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is material for it to make answer unto, answers and says:

I.

Answering the first and second paragraphs of the bill, this defendant, which for convenience will be referred to hereinafter as the commission, admits, for the purposes of this suit, that the allegations contained in said paragraphs are true, except that it denies that defendant The Pennsylvania-Ohio Power & Light Company is a street railway and alleges that it is a common carrier by railroad engaged in the transportation of passengers and property from points in one State to points in another State.

II.

30 Answering the third and fourth paragraphs of the bill, the commission admits, for the purposes of this suit, that the allegations contained in said paragraphs are true.

III.

Answering the fifth paragraph of the bill, the commission disclaims information sufficient to form a belief as to the accuracy of the allegations contained therein, and therefore the commission neither admits nor denies the truth of such allegations.

IV.

Answering the sixth to the twelfth paragraphs, inclusive, of the bill, the commission admits and alleges that, upon petition by defendant, The Pennsylvania-Ohio Power & Light Company, alleging that the observance by it of various franchise ordinances and regulations imposed by the authority of the State of Ohio causes and results in undue and unreasonable preference and advantage to intrastate commerce, to the undue and unreasonable prejudice and disadvantage of interstate commerce and results in unjust and unreasonable discrimination against interstate commerce, the commission, on January 27, 1921, instituted an investigation, docketed as No. 12123, to determine, among other things—

* * * the reasonableness of petitioner's interstate rates, fares, and charges as shown in said I. C. C. No. 4 and whether the rates, fares, and charges required by authority of the State of Ohio to be maintained by said petitioner cause or will cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce * * *.

The commission further alleges that copies of the order of investigation and of the notice assigning the case for hearing were sent by registered mail, among others, to the Governor of Ohio, the Governor of Pennsylvania, the Public Service Commission of Pennsylvania, the Public Utilities Commission of Ohio, and to the mayors of Youngstown, Ohio, Sharon, Pa., and Hubbard, Ohio; that the
31 full hearing provided for in section 13 of the interstate commerce act was accorded to all interested parties; that at said hearing a large volume of testimony and other evidence bearing upon the matters under investigation was submitted to the commission for consideration; that subsequently the questions presented for decision were fully argued, both orally and in briefs, and the matters and things involved in said case were submitted to the commission for determination, whereupon, on November 7, 1921, the commission determined said questions and made its report, findings, and order in said docket No. 12123, Ohio rates, fares, and charges, 64 I. C. C. 493, which are attached hereto, marked "Exhibit A," and are hereby referred to and made a part hereof.

The commission further alleges that said findings were and are, and each of them was and is, fully supported and justified by the record before the commission in said proceeding.

The commission further alleges that in making said report, findings, and order it considered and weighed carefully, in the light of its own knowledge and experience, every fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding, including matters covered by the allegations in the petition herein. The commission further alleges that said report, findings, and order were not made by it either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; and that in making them it did not exceed the authority which was duly conferred upon it, or exercise that authority in an unreasonable manner.

V.

Except as herein expressly admitted, the commission denies the truth of each of and all the allegations contained in the peti-
32 tion herein in so far as they conflict either with the allegations in this answer, or with the statements or conclusions of fact included in the commission's said report, findings, and order.

All of which matters and things the commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
By WALTER MCFARLAND, *Counsel.*

P. J. FARRELL, (signed)
P. J. FARRELL,
Of Counsel.

[Affidavit of C. C. McChord to above paper omitted in printing.]

33 *Exhibit A to answer.*

[Omitted, printed side p. 18.]

43 [File indorsement omitted.]

In the District Court of the United States, Northern District of Ohio, Eastern Division.

[Title omitted.]

Answer of the Pennsylvania-Ohio Power & Light Company.

(Filed April 1, 1922.)

The Pennsylvania-Ohio Power & Light Company, one of the defendants in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exceptions to the many errors and insufficiencies in the plaintiff's amended bill of complaint contained for answer thereunto,

or unto so much or such parts thereof as this defendant is advised is material for it to make answer unto, avers and says:

1. Answering the first paragraph of the bill, this defendant admits, for the purposes of this suit, that the allegations contained therein are true except that it denies that it owns and operates an electric street railway which runs between Youngstown, Ohio, to the Ohio-Pennsylvania State line, a distance of about 12 miles, and alleges that it owns and operates a high-speed interurban electric railroad between Youngstown, Ohio, and Sharon, Pennsylvania, a distance of 14.5 miles, the greater part of which is on private right of way and of standard gauge construction, and is common car-
44 rier by railroad engaged in the transportation of passengers and property from the State of Ohio to other States and vice versa, being incorporated under the provisions of section 8625 of the General Code of Ohio and having the power of eminent domain.

2. Answering the second paragraph of the bill, this defendant admits, for the purpose of this suit, that the allegations contained therein are true.

3. Answering the third paragraph of the bill, this defendant admits, for the purpose of this suit, that the allegations contained therein are true, except that it denies that the Youngstown & Sharon Street Railway Company was in the form of a street railway and that this defendant operates it as a street railway division, and alleges that it was in form a common carrier by electric railroad engaged in the general transportation of persons and property, and is operated by this defendant as a common carrier by electric railroad engaged in the general transportation of persons and property from the State of Ohio to other States, and vice versa.

4. Answering the fourth paragraph of the bill, this defendant admits, for the purpose of this suit, that the allegations contained therein are true, except that it denies that the said franchise ordinance or contract fixed the lawful rates of fare which might be collected for the transportation of persons, and alleges that the rates of fare therein contained were at the date of said contract or franchise ordinance and ever since have been subject to modification as is provided by the interstate commerce act as amended.

5. Answering the fifth paragraph of the bill, this defendant is not informed as to the truth of the allegations contained therein, and if the same be material requires strict proof thereof.

6. Answering the sixth paragraph of this bill, this defend-
45 ant admits, for the purpose of this suit, that the allegations contained therein are true, and alleges that it had a lawful right to file such tariff with the Interstate Commerce Commission (hereinafter called the commission), and that the rates contained therein, and especially the rates, fares, and charges between Youngstown, Ohio, and Sharon, Pennsylvania, and between Hubbard, Ohio, and Sharon, Pennsylvania, were and are (except in so far as they have been modified by subsequent tariffs) the legal rates and the

only rates which this defendant can collect for the transportation of passengers between said points.

7. Answering the seventh paragraph of this bill, this defendant admits, for the purpose of this suit, that the allegations contained therein are true, except that it denies that the tariff filed with the commisison further increased the rates of fare between Hubbard, Ohio, and Sharon, Pennsylvania, and avers that the said rates between said points were the same as those contained in the tariff mentioned in the sixth paragraph of the bill.

8. Answering the eighth paragraph of the bill, this defendant admits, for the purpose of this suit, that the allegations contained therein are true, and alleges that a tariff containing rates for the transportation of passengers between Youngstown and Hubbard, Ohio, similar to those contained in the tariff filed with the commission, was filed with the public utilities commission of Ohio and was rejected by said public utilities commission, which ordered this defendant to refile a tariff containing rates as set forth in said contract or franchise ordinance.

9. Answering the ninth paragraph of the bill, this defendant admits, for the purpose of this suit, that the allegations contained therein are true, and alleges the rates collected for the transportation of passengers between Hubbard, Ohio, and Sharon, Pennsylvania, are the rates contained in the tariffs lawfully filed and published with the commission and are the legal rates and the only rates which this defendant can collect.

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10. Answering the tenth paragraph of the bill, this defendant admits, for the purpose of this suit, that the allegations contained therein are true, and alleges that it filed a petition with the commission under the provisions of section 13 of the interstate commerce act as amended alleging that the rates, fares, and charges made and imposed by the said contract or franchise ordinance of the plaintiff and by the said public utilities commission of Ohio caused an undue and unreasonable advantage, preference, or prejudice as between persons in the said city of Youngstown, Ohio, and in the said village of Hubbard, Ohio, and to said localities in intrastate commerce on the one hand and interstate commerce on the other hand, and caused an undue and unreasonable and unjust discrimination against the said city of Sharon, Pennsylvania, and persons in interstate commerce, and against interstate commerce itself.

The defendant further alleges that the commission on January 27, 1921, instituted an investigation, docketed as No. 12123, to determine, among other things:

"the reasonableness of petitioner's (the defendant herein) interstate rates, fares, and charges as shown in said I. C. C. No. 4, and whether the rates, fares, and charges required by authority of the State of Ohio to be maintained by said petitioner cause or will cause any undue or unreasonable advantage, preference, prejudice

as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce * * *."

Copies of this order of investigation, together with the notice assigning the case for hearing, were sent by registered mail, among others, to the Governors of the State of Ohio and the Commonwealth of Pennsylvania, the Public Service Commission of the Commonwealth of Pennsylvania, the public utilities commission of
47 Ohio, and to the mayors of Youngstown and Hubbard, Ohio, and Sharon, Pennsylvania.

A full hearing as is provided in section 13 of the interstate commerce act as amended was accorded to all interested parties and at said hearing the plaintiff, the said city of Youngstown, and this defendant were represented by counsel; that at said hearing a large volume of testimony and exhibits bearing upon the matters under investigation was submitted to the commission for consideration; that subsequently the questions presented for decision were fully argued both orally and in briefs by counsel for the aforesaid parties, and the matters and things involved in said case were submitted to the commission for determination, whereupon, on November 7, 1921, the commission determined said questions and made and entered its report, findings, and order in said docket No. 12123, and published the said report, findings, and order, Ohio Rates, Fares & Charges, in volume 64 of the Interstate Commerce Commission's reports, page 493, a copy of which is attached to the answer of the commission in this suit, and hereby adopted by this defendant.

The said report, findings, and order were and are, and each of them was and is, fully supported and justified by the record before the commission in said proceedings, and were not made by it either arbitrarily or unjustly or contrary to relevant evidence, or without evidence to support them; and that in making them the said commission did not exceed its authority which has been duly conferred upon it, or exercise that authority in an unreasonable or arbitrary manner, but carefully considered every fact, circumstance, and condition called to its attention by the aforesaid parties to said proceeding, including all the matters covered by the allegations set forth in this bill.

11. Answering the eleventh paragraph of the bill, this de-
48 fendant alleges that the same sets forth conclusions of law and denies that the report and order of the commission are void for the reasons set forth therein, but are valid and in accordance with law.

12. Answering the twelfth paragraph of the bill, this defendant alleges that the same sets forth conclusions of law, and denies that the plaintiff has been injured in its property rights and has no adequate remedy at law and will suffer irreparable injury, and alleges

that the plaintiff has no property rights which have been injured and has no standing to maintain this bill, and has an adequate remedy at law and will not suffer irreparable damage.

13. Except as herein expressly admitted, this defendant denies the truth of each and of all allegations contained in the plaintiff's bill in so far as they conflict either with the allegations of this answer or with the statements or conclusions of fact included in the commission's report and order.

All of which matters and things the Pennsylvania-Ohio Power & Light Company is ready to aver, maintain, and prove as this Honorable Court shall direct.

Wherefore, this defendant prays that the plaintiff's bill shall be dismissed with costs. And it will ever pray.

DOUGLASS D. STOREY,
Solicitors for the Pennsylvania-Ohio Power & Light Company.

HARRINGTON, DE FORD, HUXLEY & SMITH,
Youngstown, Ohio.

HAUSE, EVANS & BAKER,
Harrisburg, Pa.
Of counsel.

49 [Affidavit of G. T. Seely to above paper omitted in printing.]

50 [File endorsement omitted.]

In the District Court of the United States, for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Motion for an interlocutory injunction.

(Filed Dec. 12, 1921.)

Now comes the plaintiff in the above-entitled suit, The Village of Hubbard, by its attorneys, and moves this Honorable Court to grant a writ of injunction against said defendant and each of them, their agents, attorneys, clerks, servants, and employees pending this suit and until the further order of the court conformable to the prayer of the bill in said case filed.

JOHN J. BOYLE and
MOORE, BARNUM & HAMMOND,
Attorneys for The Village of Hubbard.

51 [File endorsement omitted.]

In the District Court of the United States, for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Opinion.

(Filed March 13, 1922.)

Before Donahue, Circuit Judge, Killits and Westenhaver, District Judges.

Westenhaver, District Judge:

This suit is brought under the terms of the act of October 22, 1913. (U. S. Comp. Stat. 1916, sec. 998.) Plaintiff seeks a preliminary injunction restraining the Pennsylvania-Ohio Power & Light Company from putting into effect an order of the Interstate Commerce Commission made November 7, 1921. This order requires that company to cease and desist from practicing a certain undue prejudice, preference, advantage, and unjust discrimination found by the commission to exist in the relation of intrastate and interstate passenger fares, and to establish, put in force, and maintain a certain schedule of passenger fares for the transportation of passengers in intrastate commerce between Hubbard, in the State of Ohio, and Youngstown, in the State of Ohio.

52 This cause has been heard, argued, and submitted upon plaintiff's application for a preliminary injunction; the motion of the defendants, the United States and the Pennsylvania-Ohio Power & Light Company, to dismiss plaintiff's bill; and upon the merits as affecting plaintiff's right to relief, as they arise upon an answer filed by the Interstate Commerce Commission. The motion to dismiss is on two grounds—(1) that plaintiff is without interest in the controversy and has no standing in this court to maintain its bill; (2) that the bill is without equity on its face and does not state a cause of action. The answer of the Interstate Commerce Commission sets up its findings of fact and its order, and contends that inasmuch as these findings are supported by substantial evidence, they are conclusive upon the court, and hence that the plaintiff is not entitled to any relief. On this hearing the full transcript of the proceedings and testimony taken by the Interstate Commerce Commission, in addition to its report and order, were introduced in evidence, and are considered in disposing of the several matters presented for consideration.

Plaintiff assails the validity of the Interstate Commerce Commission's order on several grounds, which, stated in our own language, reduce themselves to two: (1) That Congress has not conferred jurisdiction on the commission over an electric interurban railway company of the kind which the record shows the Pennsyl-

vania-Ohio Power & Light Company to be, particularly over its purely intrastate transportation of passengers conducted under State and municipal franchises which are in legal effect binding contracts: (2) that the franchise granted by the village of Hubbard to the predecessor in title of the Pennsylvania-Ohio Power & Light Company and duly accepted by it and binding as a contract on the present defendant, requires the transportation of passengers between Hubbard, Ohio, and Youngstown, Ohio, at a fixed rate of fares, which franchise contract can not be impaired by an order of the Interstate Commerce Commission, and is, indeed, be-
53 yond the constitutional power of Congress itself to annul and impair. Such, in brief, are the respective contentions.

The situation is fully and correctly set forth in the Interstate Commerce Commission's report, and, inasmuch as this has been published, 64 I. C. C. 498, it will not be repeated here except so far as is necessary to show clearly the questions to be decided and the basis of our decision. In 1901, a franchise ordinance was passed by the village of Hubbard and accepted by the Youngstown & Sharon Railway Company, a corporation chartered as a street railway under the statutes of Ohio, to operate between Youngstown, Ohio, and Sharon, Pennsylvania. In 1917 this company was merged with four other Ohio corporations and one Pennsylvania corporation under the name of the Mahoning & Shenango Railway & Light Company. This name was subsequently, in 1920, changed to the Pennsylvania-Ohio Electric Company. On November 21, 1920, a new corporation, the present defendant, the Pennsylvania-Ohio Power & Light Company, was organized to take over and operate the Youngstown-Sharon line. The line thus acquired by defendant, and now operated by it, extends from Youngstown, Ohio, only to the Ohio-Pennsylvania State line, and the defendant operates its cars from the State line into Sharon, Pennsylvania, a fractional part of a mile, over the tracks of the Shenango Valley Traction Company.

The maximum distance from Youngstown to Hubbard is 8.75 miles, and from Hubbard to Sharon is 7.18 miles. The franchise provides for the maintenance between Hubbard and Youngstown of a cash fare of 12 cents, and between Hubbard and Sharon of a cash fare of 13 cents. Between Hubbard and both cities the franchise requires the sale of round-trip tickets at the rate of 20 cents for a single ticket, special tickets good for 22 rides for $2.00, and 54-trip commutation tickets for $3.80. Effective February 15, 1920, this Mahoning & Shenango Railway & Light Company, then
54 the owner and operator of defendant's line, by a tariff filed with the Interstate Commerce Commission, increased its one-way fare between Hubbard and Sharon to 20 cents, the price of a 54-trip commutation ticket to $5.00, and cancelled the round-trip and special tickets between these points. Subsequently, the Pennsylvania-Ohio Electric Company, successor to the Mahoning & Shenango Railway & Light Company, also filed with the Interstate Commerce Commission a tariff in which it proposed to establish

the same rates of fare between Hubbard and Youngstown as those in effect between Hubbard and Sharon, as above stated, and also to increase and establish certain through fares between Sharon and Youngstown, being substantially the sum of the local fares. A tariff carrying these same fares was presented to and rejected by, the Public Utilities Commission of Ohio in so far as it attempted to increase the fares between Hubbard and Youngstown, on the ground that this commission was without jurisdiction to allow and establish rates and charges in excess of those prescribed by franchise contracts. This seems to be the present state of the Ohio law. See Mahoning & Shenango Ry. & Light Co. v. Public Utilities Commission, 98 O. S. 303; Interurban Ry. Co. v. Public Utilities Commission, 98 O. S. 267; Toledo, Bowling Green & Southern Traction Co. v. Public Utilities Commission, 98 O. S. 305. In consequence of these complications the Pennsylvania-Ohio Power & Light Company filed its petition with the Interstate Commerce Commission complaining of the undue preference and discrimination existing between interstate and intrastate pasenger fares, which, after notice and on hearing, resulted in the order above stated, which plaintiff is seeking to enjoin.

The Interstate Commerce Commission's findings of fact, it is settled law, are conclusive upon this court if supported by substantial evidence. Interstate Commerce Commission v. Louisville &
54 Nashville R. R. Co., 227 U. S. 88; Manufacturers Ry. Co. v. United States, 246 U. S. 457, 481; Seabord Air Line Ry. Co. v. United States, 254 U. S. 57, 62. The commission's findings of fact in this situation are: That the interstate passenger cash and 54-ride commutation fares between Sharon and Hubbard, and also the interstate passenger fares between Sharon and Youngstown, are just and reasonable fares for interstate transportation between those points; that the maintenance of corresponding intrastate fares between Hubbard and Youngstown lower than the just and reasonable interstate fares between Sharon and Hubbard has resulted, and will result, in undue prejudice to persons traveling in interstate commerce over the petitioner's line in the State of Pennsylvania and between points in the State of Ohio and Sharon, Pennsylvania, in undue preference and advantage to persons traveling intrastate between points in Ohio, and in unjust discrimination against interstate commerce; also, that whether the passenger fares pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services are performed under substantially similar circumstances and conditions; and that said undue prejudice and preference and unjust discrimination can, and should, be removed by establishing intrastate passenger cash and 54-ride commutation fares between Hubbard and Youngstown not less than the interstate passenger fares found to be reasonable as between Hubbard and Sharon. It is ordered that passenger fares between Hubbard, Ohio, and Youngstown, Ohio, shall be charged which shall not be less than 20 cents

when paid in cash and $5.00 for 54 rides when a commutation ticket is purchased.

Plaintiff's contention that defendant's railroad is not that kind of a railroad engaged in interstate commerce or transportation which is made subject to the jurisdiction of the Interstate
56 Commerce Commission, requires an inquiry as to whether the facts found in this respect by the commission support its assumption of jurisdiction. Plaintiff contends that it is not engaged in the general business of transporting freight in addition to its passenger and express business, and that it is not operated as a part of a general steam-railroad system of transportation. The controversy before the commission involved nothing except passenger fares. In the commission's report it is said: "Petitioner is also engaged in the transportation of freight, as will be later explained." Later in the report the facts in this regard are stated. The defendant has two connections, one direct, and the other over a private siding at Masury and at stop 41, both between Hubbard, Ohio, and Sharon, Pa., with the New York Central Railroad. It does not originate and deliver freight traffic to the New York Central Railroad, but during the year 1919 and 1920, 922 cars of freight were received by it from that line for delivery chiefly at points on defendant's line. The defendant also operates a daily less-than-carload freight or parcel package service between Youngstown and Sharon, and on three days a week operates a through car for such service from Sharon, in Pennsylvania, to Newcastle, Pa. This through car, it will be noted, is loaded and operated wholly outside of the State of Ohio and is transported on a line not owned by defendant. In 1919 this less-than-carload freight amounted to 6,240 tons and produced a gross revenue of $18,000. The revenue from carload and switching services on cars received from the New York Central was $6,246.52. In 1920 the less-than-carload freight was 5,474 tons and produced a revenue of $21,221, and the carload and switching traffic yielded $5,259. The passenger revenue receipts for 1920 were $332,173.43 and in 1921 were $367,529.22. Thus it appears that the entire receipts from freight and switching services, including the carload freight
57 from Sharon, in Pennsylvania, to Newcastle, Pennsylvania, are equal, substantially, to 7 per cent only of the entire gross earnings. Plaintiff asserts that demurrage on cars received from the New York Central Railroad begins to run from the time the cars are delivered to the defendant's line, and that its less-than-carload freight from Youngstown to Sharon consists, in reality, only of parcels or packages more nearly akin to express service than to freight traffic.

Upon these facts logically the first proposition of law to be considered is whether defendant's objection is sound, that the plaintiff is without interest in the controversy and has no standing in court. Neither in the oral argument nor in the briefs filed is this proposi-

tion given much consideration, and no authorities are cited supporting the contention. We assume this contention to be that the village of Hubbard in its corporate capacity has no such interest in the rights of passengers on defendant's railway, even though citizens and residents of the village of Hubbard, as will entitle it to maintain an action in their behalf, and that this case falls within the rules of law announced in Oklahoma *v.* A., T. & S. F. Ry. Co., 220 U. S. 277. In this case it was held that the State of Oklahoma might not sustain an original bill in the United States Supreme Court to enjoin undue discrimination against its citizens in favor of citizens of the State of Kansas. The principles of that case are not applicable. The village of Hubbard was served by the Interstate Commerce Commission with a copy of its order of investigation, appeared, and was heard. Section 13, interstate commerce act, permits municipal corporations to apply by petition to the Interstate Commerce Commission to correct certain forbidden practices. It also confers full power and authority upon the commission to institute inquiries on its own motion or on the petition of any carrier into any rate
58 or fare made or imposed by authority of any State. Obviously, therefore, if a franchise contract made by a municipality with a carrier is the basis of the inquiry, that municipality should be made a party and be given an opportunity to be heard; and if so, it has the same right as any other party in interest to seek redress in this court against an erroneous or unlawful order of the commission. It has long been the practice to permit representative associations and exchanges to institute and maintain proceedings before the commission and to be heard in court against its orders. See Judson on Interstate Commerce, 3rd ed., sec. 437. In City of New York v. United States, et al. (2 C. C. A.), 272 Fed. 768, a municipal corporation, the city of New York was the party plaintiff, and, although relief was denied on the merits, it was expressly held that the city's interest was such as entitled it to maintain the action.

Moreover, Ohio municipal corporations, when parties to a franchise contract, may be parties to actions to enjoin a violation or to enforce the terms thereof. G. C. sec. 4311 and 4312; City of Springfield v. Springfield Gas Co., 12 C. C. (N. S.) 392, affirmed without report. 81 O. S. 537. No good reason is perceived why the plaintiff, as a party to a franchise contract injuriously affected, may not both here and before the Interstate Commerce Commission become a party to and maintain such suits as are necessary to assert and protect its contract rights.

Defendant's objection that plaintiff's bill does not state a cause of action, and plaintiff's objection that the order of the Interstate Commerce Commission is void because defendant's electric street or interurban railway is not brought within the power and authority conferred by Congress on the commission, depend upon the same considerations and will be considered together. Plaintiff's objection that the order of the commission, if within the apparent power

thus conferred on the commission is none the less void, be-
59 cause it invades the reversed power of a State over purely intrastate transportation or because it impairs the obligations of a franchise contract, depends upon separate and independent considerations. We shall consider these propositions in the reverse order.

In the view we take of this case it becomes unnecessary to consider any question of constitutional power on the part of Congress. It is true that franchise grants, under the law of Ohio, are contracts binding upon both parties, and that the State of Ohio may not impair the obligation thereof. It is also true that a franchise of the kind under consideration, fixing the rate to control beyond the limits of the municipality granting it, is within the power conferred upon municipalities by the Legislature of Ohio, and is valid and binding between the parties to it. See Interurban Railway & Terminal Co. v. City of Cincinnati, 93 O. S. 108; Interurban Railway Co. v. Public Utilities Commision, 98 O. S. 287; City of Cleveland v. Cleveland City Ry. Co., 194 U. S. 517; Columbus Railway, Power & Light Co. v. Columbus, 249 U. S. 399. It may also be true that the principles of law announced in Houston & Texas Ry. Co. v. United States, 234 U. S. 343, known as the Shreveport case; American Express Co. v. Caldwell, 244 U. S. 617; Illinois Central Railway Co. v. Public Utilities Commission, 245 U. S. 493; and particularly in Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., decided by the United States Supreme Court February 27, 1922, known as the Wisconsin passenger fare case, are not applicable to the precise situation here presented. However, we pass without deciding the questions raised and argued on this contention of plaintiff, for the reason that we are content to dispose of the case upon a consideration of plaintiff's other contention.

60 Plaintiff contends that upon the facts as found the Pennsylvania-Ohio Power & Light Company is not a street electric passenger railway engaged in the general business of transporting freight, in addition to its passenger and express business, nor a street or suburban electric railway operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, but, on the other hand, is a street or interurban electric railway of different character and such as has not been made subject to the jurisdiction of the Interstate Commerce Commission.

Apparently, then, the question at issue comes down to one of power in the Interstate Commerce Commission; that is to say, the power and authority conferred on the commission by the interstate commerce act. That act does not, by its terms, confer jurisdiction on the Interstate Commerce Commission over all interstate carriers or all interstate commerce or traffic. It is limited to interstate commerce or transportation carried on by certain kinds of interstate carriers. Thus Mr. Justice Lamar, delivering the opinion in Omaha

Street Railway v. Interstate Commerce Commission, 230 U. S. 324, 336, said: "When these street railroads carry passengers across a State line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887." It was accordingly held that an electric street railway operating in and between Council Bluffs, Iowa, and Omaha, Nebraska, over a bridge across the Missouri River constructed for freight and passenger traffic under an act of Congress was not subject to the jurisdiction nor its rates within the control of the Interstate Commerce Commission. A careful examination, therefore, of the several provisions of the interstate commerce act becomes necessary.

61 From 1887 to 1906 the purview of the act was limited to commerce between the States carried by railroads. By the Hepburn Act of 1906 oil pipe lines, express companies, and sleeping car companies were brought within its scope. By the act of 1910 were added telegraph, telephone, and cable companies. The transportation act of 1920 leaves the provisions of the act as to the carriers subject to the jurisdiction of the commission as they were in these previous acts, but refers more frequently to street or suburban and interurban electric railways in order to exclude them from the purview of certain provisions and sections of the act.

Section 1 provides, among other things, as follows: "That the provisions of this act shall apply to common carriers engaged in (a) the transportation of passengers or property *wholly by railroad*, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment * * * but shall not apply (a) to the transportation of passengers or property or to the receiving, delivering, storage, or handling of property *wholly within one State* and not shipped to or from a foreign country from or to any place in the United States as aforesaid." The most material language of the provision above quoted are the words "wholly by railroad" and "transportation of passengers or property * * * wholly within one State." This language was in section 1 of the act of 1887, and has been repeated in this section every time the section has been amended. This section was amended and reenacted with this language in the transportation act of 1920, and must, in ascertaining the meaning of the act, be given equal weight and significance with new paragraphs 3 and 4 of amended section 13, so much relied on by defendants. For the purposes of this case our inquiry is limited to a determination of what are common carriers by railroad, and the further inquiry is, What is a railroad within the purview

62 of this act? The definitions of "common carrier" and of "railroad" and of "transportation" in paragraph 3, section 1, transportation act, 1920, give no aid in answering these inquiries.

It was not until the amendments of June 18, 1910, that street electric railways are mentioned in the act. The authority previously conferred to establish through routes subject to the limitation "that no reasonable or satisfactory through routes exist" was by the 1910

amendment enlarged so that the commission might thereafter, whenever it deemed it necessary or desirable in the public interest, establish through routes without regard to existing routes. This power, however, was limited by a provision in these words: "The commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character."

This language is ambiguous. Previous to its enactment the Interstate Commerce Commission had assumed jurisdiction over electric street railways carrying passengers alone in numerous cases. See 7 I. C. C. 83; 13 I. C. C. 20; 20 I. C. C. 406; 20 I. C. C. 486. The provision above quoted, it was argued, was an indirect recognition that this jurisdiction was rightfully assumed and also a recognition by implication that electric street railways were railroads as defined in section 1, and were therefore subject to the jurisdiction of the commission. On the other hand, it was urged that this proviso was inserted out of an abundance of caution and to repel the implication that the word "railroad" as used in section 1, did include street electric railways as well as railroads, well-known highways of interstate commerce, as undertood when the original act was passed.

63 In Omaha Street Railway Co. *v.* Interstate Commerce Commission, 230 U. S. 324, decided June 9, 1913, this difference of opinion was settled by holding that "railroads" as used in the interstate commerce act was limited to railroads as distinguished from street railroads, and that the proviso of June 28, 1910, above quoted, was probably inserted out of an abundance of caution and did not warrant the holdings previously made by the Interstate Commerce Commission and by the Commerce Court that ordinary street electric railways engaged in interstate transportation of passengers had been brought within the jurisdiction of the Interstate Commerce Commission. This case will be referred to again at more length, but before doing so the several additional references to street electric railways in the interstate commerce act should be noted.

In section 1, paragraph 22, transportation act, 1920, it is provided: "The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, *which are not operated as a part or parts of a general steam railroad system of transportation.*"

New section 15a is, in part, as follows: "When used in this section * * * the term 'carrier' means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this act, excluding (a) sleeping car companies and express companies, (b) *street or suburban electric railways* unless operated as a part of a general steam railroad system of

transportation, (c) *interurban electric railways* unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight." It should be noted that this definition of the word "carrier" is for the pur-
64 poses of section 15a. That section has for its object the establishment of such tariff rates as will enable the carriers, either as a whole or in groups, to earn an annual net railway operating income equal as near as may be to a fair return upon the aggregate value of their property. In passing it should also be noted that the provisions of this section and of section 20a are the main support of the enlarged jurisdiction of the Interstate Commerce Commission to fix purely intrastate rates, as will appear from a reading of Chief Justice Taft's opinion in the Wisconsin passenger fare case above cited.

New section 20a provides, in part, as follows: "That as used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation), which is subject to this act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this act." This definition likewise is for the purposes of that section, and the section deals with the issue of capital stock or other securities by railroads, and confers wide powers with respect thereto upon the Interstate Commerce Commission.

The foregoing are all the references to street electric railways or interurban railways found in the interstate commerce act. However, two other references thereto are found in other parts of the transportation act of 1920. In section 209, providing for a guaranty to carriers during a limited period after termination of Federal control, it is provided: "When used in this section the term 'carrier' means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, or which has
65 heretofore engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under Federal control; and (2) a sleeping-car company whose system of transportation is under Federal control at the time Federal control terminates, but does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, *which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both.*"

In section 300, Title III, creating the labor board to deal with disputes between carriers and their employees and subordinate officials, it is provided: "When used in this title—(1) The term 'carrier' includes any express company, sleeping-car company, and any carrier by railroad subject to the interstate commerce act, except a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation."

Summarizing and bringing together the references to carriers above quoted otherwise than by railroad, we find street electric railways referred to in these several words: In section 1, paragraph 22, it is "street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation." In section 15, as amended June 18, 1910, and reenacted February 28, 1920, the reference is to "street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business." In new section 15a the reference is to "street or suburban electric railways unless operated as a part of a general steam railroad system of transportation." Also to "interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight." In new section 20a the reference is to "street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation." In section 209, Title II, transportation act of 1920, the reference is to "a street or interurban electric railway * * * which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic." In section 300, Title III, the reference is "a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation."

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Despite these differences in phraseology there is a marked similarity in the characteristics attributed to street electric railways which include them within the jurisdiction of the commission. These characteristics are (a) being operated as a part or parts of a general steam railroad system of transportation; (b) engaged in the general business of transporting freight in addition to their passenger and express business; (c) having as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both. In the varied instances street electric railways, whether urban, suburban, or interurban, which do not have these characteristics are excluded from the jurisdiction of the commission. If they have those characteristics, obviously they would be under the jurisdiction of the commission. This being true, does it not follow that defendant's railway, even though an interurban electric railway engaged in the interstate transportation of passengers, must be regarded as outside the jurisdiction and control of the commission unless it possesses one or more of these distinguishing characteristics? Before this question is answered we shall review the pertinent decisions.

As already stated, the Interstate Commerce Commission early assumed jurisdiction over street or interurban electric railways if engaged to any extent in the interstate transportation of passengers, even if not engaged in the general transportation of freight. See the references above given. In Omaha & Council Bluffs Street Railway Co. *v.* Interstate Commerce Commission, 179 Fed. 243, Circuit Judges Sanborn, Hook, and Adams, differing from

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the Interstate Commerce Commission, held that street railway companies engaged in operating street cars by electricity for the transportation of passengers were not within the definition of common carriers by railroad, as used in section 1 of the interstate commerce act, but that common carriers by railroad meant commercial railroad companies engaged in the general transportation of freight and passengers. Accordingly a preliminary injunction was awarded against the commission's order undertaking to regulate interstate transportation of passengers by an electric street railway. This case was tranferred to the United States Commerce Court, and that court on final hearing reversed the circuit judges. See 195 Fed. 40. The United States Supreme Court, in Omaha Street Railway Co. *v.* Interstate Commerce Commission (supra), reversed the commerce court and affirmed the circuit court. In appraising the force and effect of this decision it is necessary to take into account the long line of Interstate Commerce Commission decisions prior thereto holding to the contrary and to note carefully the reasoning of the commerce court in sustaining them. There is marked similarity in that reasoning and in the reasoning of the later opinions of the Interstate Commerce Commission upon the basis of which the order now under consideration was made.

Mr. Justice Lamar, delivering the unanimous opinion of the Supreme Court holding that street electric railways, although engaged in interstate transportation of passengers, were not common carriers by railroad, as defined in section 1 of the interstate commerce act, gives reasons therefor which, it seems to us, are as sound
68 to-day as they were in 1913. He says: "Applying this universally accepted rule of construing this word, it is to be noted that ordinary railroads are constructed on the companies' own property. The tracks extend from town to town and are usually connected with other railroads which themselves are further connected with others, so that freight may be shipped, without breaking bulk, across the continent. Such railroads are channels of interstate commerce. Street railroads, on the other hand, are local, are laid in streets as aids to street traffic and for the use of a single community, even though that community be divided by State lines or under different municipal control. When these street railroads carry passengers across a State line, they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887." Further, "The railroads referred to in the act were not those having separate, distinct, and local street lines but those of whom it was required that they should make joint rates and reasonable facilities for interchange of traffic with connecting lines, so that freight might be easily and expeditiously moves in interstate commerce." The mischief which Congress intended to remedy by the interstate commerce act is adverted to as a reason tending to show that street electric railroads were not within the purview of section 1. Street railroads, he said, "had not engaged in the pooling, rebating, and discrimination which the statute was intended to prohibit." The

question, it is true, is left open as to the proper classification of that new type of interurban railway developed since 1887 and which," with electricity as motive power, uses larger cars and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and mail for long distrnces at high speed. It is intimated that such electric interurban railways might be included within the definition of "common carrier by railroad"
69 as used in section 1, but no opinion is expressed.

So far as we have discovered, the United States Supreme Court has not again given any consideration to this precise question. It has, however, considered the definition of a street or electric interurban railway as used in the safety appliance act and the Federal employers' liability law (see Kansas City v. McAdow, 240 U. S. 51; Spokane & Inland R. R. Co. v. Campbell, 241 U. S. 17), and has held that an interurban electric railway operating from city to city and engaged in interstate traffic is within the purview thereof. The reason for these holdings is that exceptions within a remedial statute are to be strictly construed, and inasmuch as interurban electric railways engaged in the interstate transportation of passengers are within the mischief to be remedied just as much as interstate steam railroads, the exception should be limited to street railways within cities and upon city streets and in their immediate suburbs. On the other hand, the rule of construction applicable to acts of Congress encroaching upon the power of a State to regulate and control the transportation of passengers and property within a State is one of strict construction, and will not include intrastate traffic unless the intent is plainly expressed. Thus, in Illinois Central R. R. Co. v. Public Utilities Commission, 245 U. S. 493, 510, it is said: "In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless and except so far as its purpose to do so is clearly manifested."

In South Covington & Cincinnati Street Railway Co. v. City of Covington, 235 U. S. 537, much relied on by defendants, the de-
70 cision is wholly inapplicable and deals with entirely different questions. Nor does it seem to us that the question under consideration is materially affected, much less controlled, as is contended by defendants' counsel, by the Shreveport case (supra), American Express Co. v. Caldwell (supra), Illinois Central R. R. v. Public Utilities Commission (supra), nor by new paragraphs 3 and 4, section 13, interstate commerce act, nor by the decision in the Wisconsin rate case. The question here is what interstate carriers by railroad and what classes of interstate and intrastate traffic are brought within the jurisdiction of the Interstate Commerce Commission. This is a question of intention, and is to be ascertained from the provisions of the interstate commerce act, including its original as well as amended provisions and the several decisions of the Supreme Court construing the same. The decision in the Wisconsin rate case

rests heavily, if not entirely, upon new section 15a and new section 20a, both of which excluded street and interurban electric railways from the purview thereof unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight. The newly added powers and duties, including those conferred by paragraphs 3 and 4 of new section 13, apply only to railroads of a certain character and do not include electric street and interurban railways unless thus engaged. Assuming for the purpose of this opinion the existence in Congress of a power to include all street and interurban electric railways and to invalidate all municipal and State franchises relating to purely intrastate traffic, upon the principles of the Shreveport and the Wisconsin rate cases, nevertheless the intent so to do will not be inferred unless and except so far as it is clearly manifested.

From the foregoing considerations we deduce these conclusions:

Electric street, suburban, or interurban railways are included
71 within "common carriers by railroad," as that expression is used in section 1 of the interstate commerce act, only when they are of that character and engaged in that kind of traffic and under the conditions set forth in the parts of the interstate commerce act and the transportation act of 1920 as above quoted. They must be operated as a part or parts of a general steam railroad system of transportation; they must be engaged in the general business of transporting freight in addition to their passenger and express business; or they must be operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight. If they are not thus engaged or being thus operated, they are not within the act nor within the jurisdiction conferred on the Interstate Commerce Commission, even though they may be engaged in interstate passenger business. This, it seems to us, is the only proper interpretation and effect of the several amendments to the interstate commerce act made since the decision in the Omaha Street Railway case. In that case, as already stated, it was left a query as to whether the act included the new type of interurban railroad developed since the original act was passed, which operates with electricity as motive power, uses larger cars, and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and mail for long distances at high speed. It is true that Congress in excluding electric street and interurban railways did not use this descriptive language, but it used other language continuously and consistently which does exclude all electric street or interurban railways which do not possess these dominating characteristics—that is to say, that are not operated as a part of a general steam railroad system of transportation or are not engaged in the general transportation of freight in addition to their passenger and express business. It seems evident that Congress
intended to leave, and did leave, all street and interurban
72 electric railways not thus operated nor doing business of that character in the situation in which they were left by the de-

cision in the Omaha Street Railway case. This conclusion is greatly strengthened by the additions to the interstate commerce act made by the transportation act of 1920. The establishment of the labor board to settle controversies between carriers and employees, the *guaranty for* a limited period of a fixed return upon railroads, the grouping of railroads into classes and requiring rates to be fixed so as to allow a fair return to be earned on the property as a whole, the control assumed and exercised over the construction of new railroads, and the making of extensions and the issuance and sale of securities are all a part of a general scheme from which all street or interurban electric railways are excluded unless possessing these characteristics.

The remaining inquiry is whether or not, on the facts found by the Interstate Commerce Commission, the defendant railway was operated as a part of a general steam railroad system of transportation or was engaged in the general transportation of freight in addition to its passenger and express business. Plainly and admittedly, the defendant railway was not operated as a part of a general system of steam railroads for transportation. It had two switching connections, one direct and the other over a private siding, with the New York Central, a system of steam railroads, but it was independently operated, and not as a part of that system. Its traffic relations with the New York Central were limited to receiving over these switches a few carloads of inbound freight; and, so far as the New York Central is concerned, delivery was made and demurrage began to run as soon as those cars were received by the defendant railway. Nor can it be said upon the facts found that the defendant railway was engaged in the general transportation of freight in addition to its passenger and express business. It is true that
73 the commission's report refers thereto as less-than-carload freight, but this freight service appears to have consisted of packages and parcels, and is more nearly like that which is called express than freight traffic. In any event, the amount thereof is exceedingly limited, not exceeding 5 per cent of the gross earnings of the defendant company. Such an incidental and relatively insignificant and unimportant freight business can not be called the general transportation of freight in addition to its express business.

Our conclusion is that the order of the Interstate Commerce Commission is in excess of any power and jurisdiction conferred upon it by the interstate commerce act, and is void and without effect. The motion to dismiss will be denied, and a preliminary injunction will be granted as prayed.

MAURICE H. DONAHUE,
Circuit Judge.
JOHN M. KILLITS,
D. C. WESTENHAVER,
District Judges.

[All italics in sections and in quotations of statutes and from opinions are mine, unless otherwise noted.]

74 In United States District Court.

Order granting preliminary injunction and overruling motions to dismiss filed and entered March 13, 1922. D. C. Westenhaver, Judge.

[Title omitted.]

This cause having been heretofore, to wit, December 27, 1921, heard, argued, and submitted on plaintiff's application for a preliminary injunction, and on the motions of the defendants, United States of America and Pennsylvania-Ohio and Power & Light Company, to dismiss plaintiff's bill, and the court having duly considered the same, it is adjudged, ordered, and decreed that the motions to dismiss be, and they are hereby, overruled, and that a preliminary injunction be, and is, awarded as prayed in plaintiff's bill; that said defendants, and each of them, be, and are hereby, enjoined and restrained, until the further order of this court, from putting into effect the order of the Interstate Commerce Commission made November 7, 1921, a copy of which order is exhibited with plaintiff's bill: plaintiff being a municipal corporation, no bond is required.

75 [File indorsement omitted.]

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Stipulation for record for final hearing.

(Filed November 20, 1922.)

By their respective counsel, the parties stipulate that the following matter shall constitute the record for the final hearing in the above-entitled cause, viz:

1. Bill in equity and exhibits.
2. Report, findings, and order of the Interstate Commerce Commission.
3. Motions of the United States and the other defendants to dismiss the bill in equity.
4. Intervention and answer of the Interstate Commerce Commission and exhibits.
5. Answer of the Pennsylvania-Ohio Power & Light Company.
6. Motion of plaintiff for preliminary injunction.

7. Order granting preliminary injunction and overruling motions to dismiss the bill in equity.

JOHN J. BOYLE,
MOORE, BARNUM & HAMMOND,
Solicitors for Plaintiff.

EDWARD M. REIDY,
Attorney for Interstate Commerce Commission.

BLACKBURN ESTERLINE,
Assistant Solicitor General for the United States.

DOUGLASS D. STOREY,
HARRINGTON, DE FORD, HUXLEY & SMITH,
Solicitors for the Pennsylvania-Ohio Light and Power Company.

76 In the District Court of the United States for the Northern District of Ohio, Eastern Division.

Final decree.

(Filed and entered November 20, 1922.)

Maurice H. Donahue, Circuit Judge, John M. Killits and D. C. Westenhaver, Judges.

[Title omitted.]

This cause came on for final hearing at this term on the record as stipulated by the parties as shown by the stipulation on file; and the same was argued by counsel and submitted to the court; whereupon upon consideration whereof, it was further ordered, adjudged, and decreed as follows:

First. That the motions to dismiss the bill in equity and each of them, be, and they are hereby, overruled.

Second. That the order of the Interstate Commerce Commission of November 7, 1921, a copy of which is exhibited with the bill in equity be, and the same is, hereby annulled, set aside, and held for naught.

Third. That the preliminary injunction heretofore issued out of this court be, and the same is, hereby made permanent; and that the said defendants the Interstate Commerce Commission, and the Pennsylvania-Ohio Power and Light Company and each of them be, and they are hereby, permanently enjoined and restrained from putting into effect the order of the Interstate Commerce Commission of November 7, 1921, a copy of which is exhibited with plaintiff's bill.

To all of which the defendants and each of them and their respective counsel severally object and except.

77 In the District Court of the United States for the Northern District of Ohio, Eastern Division.

Notice of Appeal of U. S. of America & Interstate Commerce Commission.

(Filed February 3, 1923.)

[Title omitted.]

To the Honorable Charles C. Crabbe, Attorney General of the State of Ohio:

You are hereby notified that on the 29th day of December, 1922, an order was entered allowing an appeal by United States of America, defendant, and Interstate Commerce Commission, intervening defendant, in the above-entitled cause, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty days from the date the same was made and entered.

This notice is given you pursuant to chapter 32 at pages 220 and 221 of the Statutes of the United States passed at the first session of the Sixty-third Congress, 1913.

E. S. WERTZ,
United States Attorney, Northern District of Ohio.

Service of the above-entitled notice is hereby acknowledged, dated at Columbus, Ohio, this 1st day of February, 1923.

C. C. CRABBE,
Attorney General.

78 In the District Court of the United States for the Northern District of Ohio, Eastern Division.

Notice of appeal of U. S. of America & Interstate Commerce Commission.

(Filed February 9th, 1923.)

[Title omitted.]

To the Honorable George W. Woodruff, Attorney General of the Commonwealth of Pennsylvania:

You are hereby notified that on the 29th day of December, 1922, an order was entered allowing an appeal by United States of America, defendant, and Interstate Commerce Commission, intervening defendant, in the above-entitled cause, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty days from the date the same was made and entered.

This notice is given you pursuant to chapter 32, at pages 220 and 221 of the Statutes of the United States, passed at the first session of the Sixty-third Congress, 1913.

E. S. WERTZ,
United States Attorney, Northern District of Ohio.

Service of the above notice is hereby acknowledged. Dated at Harrisburg, Pa., this 7th day of February, 1923.

GEORGE W. WOODRUFF,
Attorney General.

79 [File endorsement omitted.]

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Petition for appeal by United States of America and Interstate Commerce Commission.

(Filed Dec. 21, 1922.)

United States of America and Interstate Commerce Commission, defendants, feeling themselves aggrieved by the final order or decree of the District Court made and entered November 20, 1922, pray an appeal to the Supreme Court of the United States therefrom.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

They pray that a transcript of the record, proceedings, and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

E. S. WERTZ,
United States Attorney, Northern District of Ohio.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

80 [File endorsement omitted.]

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Assignment of errors by and on behalf of the United States and Interstate Commerce Commission.

(Filed Dec. 21, 1922.)

United States of America and Interstate Commerce Commission, defendants, now come, by their respective counsel, and in connection

with their petition for appeal, file the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the final order or decree of the District Court entered November 20, 1922.

The District Court erred:

I. In granting the application for preliminary injunction and in issuing the preliminary injunction enjoining and restraining the defendants from putting into effect the order of the Interstate Commerce Commission of November 7, 1921, entitled "Ohio Rates, Fares, and Charges," etc., No. 12123.

II. In overruling the motion of the United States to dismiss the bill in equity and in not sustaining the motion.

III. In holding and adjudging that the Village of Hubbard was a proper party to maintain the bill in equity and in not holding
81 and adjudging that the court was without jurisdiction to entertain the same.

IV. In deciding, holding, and adjudging as follows:

No good reason is perceived why the plaintiff, as a party to a franchise contract injuriously affected, may not, both here and before the Interstate Commerce Commission, become a party to and maintain such suits as are necessary to assert and protect its contract rights.

V. In holding and adjudging that the Pennsylvania-Ohio Power & Light Company was not a common carrier engaged in the transportation of passengers or property, or both, wholly by railroad within the meaning of the act to regulate commerce, as amended.

VI. In holding and adjudging that the Interstate Commerce Commission was without jurisdiction to enter the order ov November 7, 1921, entitled "Ohio Rates, Fares, and Charges," etc., No. 12123, under the power and authority conferred upon it by the act to regulate commerce, as amended.

VII. In deciding, holding, and adjudging as follows:

Despite these differences in phraseology, there is a marked similarity in the characteristics attributed to street electric railways which include them within the jurisdiction of the commission. These characteristics are: (a) Being operated as a part or parts of a general steam railroad system of transportation; (b) engaged in the general business of transporting freight in addition to their passenger and express business; (c) having as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both. In the varied instances street electric railways, whether urban, suburban, or interurban, which do not have these characteristics are excluded from the jurisdiction of the commission.

VIII. In deciding, holding, and adjudging as follows:

The decision in the Wisconsin Rate case rests heavily, if not entirely, upon new section 15a and new section 20a, both of which excluded street and interurban electric railways from the purview thereof, unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight. The newly added powers and duties, including those conferred by paragraphs 3 and 4 of new section 13 apply only to railroads of a certain character and do not include electric street and interurban railways unless thus engaged.

IX. In deciding, holding, and adjudging as follows:

Electric street, suburban, or interurban railways are included within "common carriers by railroad," as that expression is used in section 1 of the interstate commerce act, only when they are
82 of that character and engaged in that kind of traffic and under the conditions set forth in the parts of the interstate commerce act and the transportation act of 1920 as above quoted. They must be operated as a part or parts of a general steam railroad system of transportation or they must be engaged in the general business of transporting freight in addition to their passenger and express business, or they must be operated as a part of a general steam railroad system of transportation, or engaged in the general transportation of freight. If they are not thus engaged or being thus operated, they are not within the act nor within the jurisdiction conferred on the Interstate Commerce Commission, even though they may be engaged in interstate passenger business.

X. In deciding, holding, and adjudging as follows:

It is true that Congress, in excluding electric street and interurban railways, did not use this descriptive language; but it used other language continuously and consistently which does exclude all electric street or interurban railways which do not possess these dominating characteristics—that is to say, that are not operated as a part of a general steam railroad system of transportation or are not engaged in the general transportation of freight in addition to their passenger and express business. It seems evident that Congress intended to leave, and did leave, all street and interurban electric railways not thus operated, nor doing business of that character, in the situation in which they were left by the decision in the Omaha Street Railway case.

XI. In deciding, holding, and adjudging as follows:

Its traffic relations with the New York Central were limited to receiving over these switches a few carloads of inbound freight; and, so far as the New York Central is concerned, delivery was made

and demurrage began to run as soon as those cars were received by the defendant railway.

XII. In deciding, holding, and adjudging as follows:

Nor can it be said upon the facts found that the defendant railway was engaged in the general transportation of freight in addition to its passenger and express business. It is true that the commission's report refers thereto as less than carload freight; but this freight service appears to have consisted of packages and parcels and is more nearly like that which is called express than freight traffic. In any event, the amount thereof is exceedingly limited, not exceeding 5 per cent. of the gross earnings of the defendant company. Such an incidental and relatively insignificant and unimportant freight business cannot be called the general transportation of freight in addition to its express business.

XIII. In holding and adjudging that the freight express car between Sharon, Pennsylvania, and New Castle, Pennsylvania, does not pass over the lines of the Pennsylvania-Ohio Power & Light Company in the State of Ohio, contrary to the finding of fact by the Interstate Commerce Commission.

83 XIV. In deciding, holding, and adjudging as follows:

This through car, it will be noted, is loaded and operated wholly outside of the State of Ohio and is transported on a line not owned by defendant.

XV. In issuing the permanent injunction.

XVI. In making and entering the following order or decree:

This cause came on for final hearing at this term on the record as stipulated by the parties as shown by the stipulation on file; and the same was argued by counsel and submitted to the court; whereupon upon consideration whereof, it was further ordered, adjudged, and decreed as follows:

First. That the motions to dismiss the bill in equity and each of them be and they are hereby overruled.

Second. That the order of the Interstate Commerce Commission of November 7, 1921, a copy of which is exhibited with the bill in equity, be and the same is hereby annulled, set aside and held for naught.

Third. That the preliminary injunction heretofore issued out of this court be and the same is hereby made permanent; and that the said defendants the Interstate Commerce Commission and the Pennsylvania-Ohio Power & Light Company and each of them be and they are hereby permanently enjoined and restrained from putting into effect the order of the Interstate Commerce Commission of November 7, 1921, a copy of which is exhibited with plaintiff's bill.

Wherefore, defendants, and each of them, pray that the final order or decree of the District Court entered November 20, 19221, be reversed, annulled, and set aside with directions that the permanent and the preliminary injunctions shall be dissolved and the bill in equity dismissed and for such other and further order as may be appropriate.

E. S. WERTZ,
United States Attorney, Northern District of Ohio.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
P. J. FARRELL,
Solicitor for the Interstate Commerce Commission.

84 In United States District Court.

Order allowing appeal of the United States of America and Interstate Commerce Commission.

Filed December 29, 1922, and entered by Maurice H. Donahue, circuit judge, and John M. Killits and D. C. Westenhaver, district judges.

[Title omitted.]

In the above-entitled cause. United States of America and Interstate Commerce Commission, defendants, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, made and entered November 20, 1922, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered forthwith to the Supreme Court of the United States.

85 In the District Court of the United States for the Northern District of Ohio, Eastern Division.

Notice of appeal by the Pennsylvania-Ohio Power & Light Co.

(Filed January 18, 1923.)

[Title omitted.]

To the Honorable George W. Woodruff, Attorney General of the Commonwealth of Pennsylvania:

You are hereby notified that on the 29th day of December, 1922, an order was entered allowing an appeal by the Pennsylvania-Ohio

Power & Light Company, one of the defendants in the above entitled cause, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty days from the date the same was made and entered.

This notice is given you pursuant to chapter 32 at pages 220 and 221 of the Statutes of the United States passed at the first session of the Sixty-third Congress, 1913.

HAUSE, EVANS & BAKER,
Attorneys for the Pennsylvania-Ohio Power & Light Company.

Service of the above entitled notice is hereby acknowledged, date at Harrisburg, Pa., this 17th day of January, A. D. 1923.

GEORGE W. WOODRUFF,
Attorney General.
By GUY H. DAVIES,
Law Clerk.

86 In the District Court of the United States for the Northern District of Ohio, Eastern Division.

Notice of Appeal by the Pennsylvania-Ohio Power & Light Co.

(Filed January 18, 1922.)

[Title omitted.]

To the Honorable Charles C. Crabbe, Attorney General of the State of Ohio:

You are hereby notified that on the 29th day of December, 1922, an order was entered allowing an appeal by the Pennsylvania-Ohio Power & Light Company, one of the defendants in the above-entitled cause, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty days from the date the same was made and entered.

This notice is given you pursuant to chapter 32 at pages 220 and 221 of the Statutes of the United States passed at the first session of the Sixty-third Congress, 1913.

DOUGLASS D. STOREY and
HARRINGTON, DE FORD, HUXLEY & SMITH,
Attorneys for the Pennsylvania-Ohio Power & Light Company.

Service of the above entitled notice is hereby acknowledged, dated at Columbus, Ohio, this 15th day of January, A. D. 1923.

C. C. CRABBE,
Atty. General.

87 [File indorsement omitted.]

United States District Court, Northern District of Ohio, Eastern Division.

[Title omitted.]

Petition for appeal by the Pennsylvania-Ohio Power & Light Company.

(Filed December 21, 1922.)

The Pennsylvania-Ohio Power & Light Company, defendant, feeling itself aggrieved by the final order or decree of the District Court made and entered November 20, 1922, by its counsel, prays an appeal therefrom to the Supreme Court of the United States.

The particulars wherein it considers the final order or decree erroneous are set forth in the assignment of errors on file, to which reference is made.

The defendant prays that a transcript of the record, proceedings and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

HAUSE, EVANS & BAKER,
HARRINGTON, DE FORD, HUXLEY & SMITH,
Solicitors for the Pennsylvania-Ohio Power & Light Company.

88 [File endorsement omitted.]

United States District Court, Northern District of Ohio, Eastern Division.

[Title omitted.]

Assignment of errors by and on behalf of the Pennsylvania-Ohio Power & Light Company.

(Filed December 21, 1922.)

The Pennsylvania-Ohio Power & Light Company, defendant, now comes, by its counsel, and in connection with its petition for appeal, files the following assignment of errors on which it will rely on its appeal to the Supreme Court of the United States from the final order or decree of the District Court made and entered November 20, 1922, in the above-entitled cause.

The District Court erred:

I. In granting the application for preliminary injunction and in issuing the preliminary injunction enjoining and restraining the defendants from putting into effect the order of the Interstate Com-

merce Commission of November 7, 1921, entitled "Ohio Rates, Fares, and Charges," etc., No. 12123.

II. In overruling the motion of the Pennsylvania-Ohio Power & Light Company to dismiss the bill in equity and in not sustaining the motion.

III. In holding and adjudging that the village of Hubbard was a proper party to maintain the bill in equity and in not
89 holding and adjudging that the court was without jurisdiction to entertain the same.

IV. In deciding, holding, and adjudging as follows:

"No good reason is perceived why the plaintiff, as a party to a franchise contract injuriously affected, may not, both here and before the Interstate Commerce Commission, become a party to and maintain such suits as are necessary to assert and protect its contract rights."

V. In holding and adjudging that the Pennsylvania-Ohio Power & Light Company was not a common carrier engaged in the transportation of passengers or property, or both, wholly by railroad within the meaning of the act to regulate commerce, as amended.

VI. In holding and adjudging that the Interstate Commerce Commission was without jurisdiction to enter the order of November 7, 1921, entitled "Ohio Rates, Fares, and Charges," etc., No. 12123, under the power and authority conferred upon it by the act to regulate commerce, as amended.

VII. In deciding, holding, and adjudging as follows:

"Despite these differences in phraseology, there is a marked similarity in the characteristics attributed to street electric railways, which include them within the jurisdiction of the commission. These characteristics are: (a) Being operated as a part or parts of a general steam railroad system of transportation; (b) engaged in the general business of transporting freight, in addition to their passenger and express business; (c) having as its principal source of operating revenue urban, suburban, or interurban passenger traffic, or sale of power, heat, and light, or both. In the varied instances, street electric railways, whether urban, surburban, or interurban, which do not have these characteristics are excluded from the jurisdiction of the commission."

VIII. In deciding, holding, and adjudging as follows:

"The decision in the Wisconsin Rate case rests heavily, if not entirely, upon new section 15a and new section 20a, both of which excluded street and interurban electric railways from the purview thereof, unless operated as a part of a general steam railroad system of transportation of freight. The newly added powers and duties, including those conferred by paragraphs 3 and 4 of new section 13, apply only to railroads of a certain character and do not include electric street and interurban railways unless thus engaged."

90 IX. In deciding, holding, and adjudging as follows:

"Electric street, suburban, or interurban railways are included within 'common carriers by railroads,' as that expression is used in section 1 of the interstate commerce act, only when they are of the character and engaged in that kind of traffic and under the conditions set forth in the parts of the interstate commerce act and the transportation act of 1920, as above quoted. They must be operated as a part or parts of a general steam railroad system of transporting freight in addition to their passenger and express business, or they must be operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight. If they are not thus engaged or being thus operated, they are not within the act, nor within the jurisdiction conferred on the Interstate Commerce Commission, even though they may be engaged in interstate passenger business."

X. In deciding, holding, and adjudging as follows:

"It is true that Congress, in excluding electric street and interurban railways, did not use this descriptive language; but it used other language continuously and consistently, which does exclude all electric street or interurban railways which do not possess these dominating characteristics; that is to say, that are not operated as a part of a general steam railroad system of transportation or are not engaged in the general transportation of freight in addition to their passenger and express business. It seems evident that Congress intended to leave, and did leave, all street and interurban electric railways not thus operated, nor doing business of that character, in the situation in which they were left by the decision in the Omaha Street Railway case."

XI. In deciding, holding, and adjudging as follows:

"Its traffic relations with the New York Central were limited to receiving over these switches a few carloads of inbound freight; and, so far as the New York Central is concerned, delivery was made and demurrage began to run as soon as those cars were received by the defendant railway."

XII. In deciding, holding, and adjudging as follows:

"Nor can it be said upon the facts found that the defendant railway was engaged in the general transportation of freight in addition to its passenger and express business. It is true that the commission's report refers thereto as less than carload freight; but this freight service appears to have consisted of packages and parcels, and is more nearly like that which is called express than freight traffic. In any event, the amount thereof is exceedingly limited, not exceeding 5 per cent of the gross earnings of the defendant company. Such an incidental and relatively insignificant and unimportant freight business cannot be called the general transportation of freight in addition to its express business."

XIII. In holding and adjudging that the freight express car between Sharon, Pennsylvania, and New Castle, Pennsylvania, does

not pass over the lines of the Pennsylvania-Ohio Power &
91 Light Company, in the State of Ohio, contrary to the finding of fact by the Interstate Commerce Commission.

XIV. In deciding, holding, and adjudging as follows:

"This through car, it will be noted, is loaded and operated wholly outside of the State of Ohio, and is transported on a line not owned by defendant."

XV. In issuing the permanent injunction.

XVI. In making and entering the following order or decree:

"This cause came on for final hearing at this term on the record as stipulated by the parties, as shown by the stipulation on file; and the same was argued by counsel and submitted to the court; whereupon upon consideration whereof, it was further ordered, adjudged, and decreed as follows:

"First. That the motions to dismiss the bill in equity and each of them, be, and they are hereby, overruled.

"Second. That the order of the Interstate Commerce Commission of November 7, 1921, a copy of which is exhibited with the bill in equity, be, and the same is hereby, annulled, set aside, and held for naught.

"Third. That the preliminary injunction heretofore issued out of this court be, and the same is hereby, made permanent; and that the said defendants the Interstate Commerce Commission and the Pennsylvania-Ohio Power & Light Company, and each of them, be, and they are hereby, permanently enjoined and restrained from putting into effect the order of the Interstate Commerce Commission of November 7, 1921, a copy of which is exhibited with plaintiff's bill."

Wherefore defendant prays that the final order or decree of the District Court entered November 20, 1922, be reversed, annulled, and set aside, with directions that the permanent and preliminary injunction shall be dissolved, and the bill of complaint dismissed, and for such other and further order as may be appropriate.

HAUSE, EVANS, AND BAKER,
HARRINGTON, DE FORD, HUXLEY & SMITH,
Solicitors for the Pennsylvania-Ohio Power & Light Company.

92 In United States District Court.

Order allowing appeal of the Pennsylvania-Ohio Power & Light Company.

Filed December 29, 1922, and entered by Maurice H. Donahue, Circuit Judge, and John M. Killits and D. C. Westenhaver, District Judges.

[Title omitted.]

In the above-entitled cause, the Pennsylvania-Ohio Power & Light Company, defendant, having made and filed its petition pray-

ing an appeal to the Supreme Court of the United States from the final order or decree of the District Court, made and entered November 20, 1922, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered forthwith to the Supreme Court of the United States.

It is further ordered that the Pennsylvania-Ohio Power & Light Company shall give bond on appeal in the sum of five hundred ($500) dollars and conditioned as required by law and within ten (10) days from the date hereof.

93 *Appeal bond of the Pennsylvania Power & Light Company for $500.*

(Filed and approved January 11, 1923.)

[Omitted in printing.]

95 [Citation omitted in printing.]

Service of a copy of the within citation is hereby admitted and acknowledged this 10th day of January, 1923.

MOORE, BARNUM & HAMMOND,
JOHN J. BOYLE,
Solicitors for appellee.

96 [Citation omitted in printing.]

Service of a copy of the within citation is hereby admitted and acknowledged this 10th day of January, 1923.

MOORE, BARNUM & HAMMOND,
JOHN J. BOYLE,
Solicitors for appellee.

97 In United States District Court.

Order extending time for filing transcript until February 26, 1923.

(Filed and entered by D. C. Westenhaver, Judge.)

[Title omitted.]

On application of defendants and for good cause shown, it is ordered that the time for filing the transcript of record in the United States Supreme Court be extended thirty days.

98 In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Præcipe for record.

(Filed Jan. 15, 1923.)

To the Clerk:

Please prepare a transcript of the record in the above-entitled cause and include therein, in the order given below, the following:

1. Bill in equity and exhibits.
2. Report, findings, and order of the Interstate Commerce Commission.
3. Motions of the United States and the other defendants to dismiss the bill in equity.
4. Intervention and answer of the Interstate Commerce Commission and exhibits.
5. Answer of the Pennsylvania-Ohio Power & Light Company.
6. Motion of plaintiff for preliminary injunction.
7. Order granting preliminary injunction and overruling motions to dismiss the bill in equity.
8. Stipulation for record for final hearing.
9. Final decree.
10. Petition for appeal.
11. Assignment of errors.
12. Order allowing appeal.

99 13. Præcipe for record.

14. Citation on appeal.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

100 In United States District Court.

Certificate of clerk.

NORTHERN DISTRICT OF OHIO, *ss:*

I, B. C. Miller, clerk of the United States District Court within and for said district, do hereby certify that the foregoing printed pages contain a full, true, and complete copy of the record and all proceedings in this cause, including the petition for appeal, assignment of errors, order allowing appeal, and the bond on appeal, in accordance with the precipe for transcript filed herein and the originals of which remain in my custody as clerk of said court.

There is also attached to and transmitted herewith the citation issued and allowed herein.

In testimony whereof, I have hereunto signed my name and affixed the seal of said court, at Cleveland, in said district, this 10th day of February, A. D. 1923, and in the 147th year of the Independence of the United States of America.

[SEAL.] B. C. MILLER,
Clerk.

101 [Indorsement on cover:]
File No. 29,420. Northern Ohio D. C. U. S. Term No. 228. The United States of America, Interstate Commerce Commission, and Pennsylvania-Ohio Power & Light Company, appellants, *vs.* The Village of Hubbard, Ohio. Filed February 23d, 1923. File No. 29,420.

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